Supreme Court, U. S.
FILED
DEC 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-867

THE OKLAHOMA PUBLISHING COMPANY,
a corporation,

Petitioner,

v.

THE DISTRICT COURT OF OKLAHOMA COUNTY, and THE HONORABLE CHARLES E. HALLEY, Acting Associate District Judge thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO: THE SUPREME COURT OF THE STATE OF OKLAHOMA

MICHAEL MINNIS
RAINEY, WALLACE, ROSS & COOPER
735 First National Center West
Oklahoma City, Oklahoma 73102
(405) 235-1356
Counsel for Petitioner

Of Counsel
RICHARD M. SCHMIDT, JR.
IAN D. VOLNER
COHN & MARKS
1920 L Street, N.W.
Washington, D.C. 20036
(202) 293-3860

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
Opinions Below	3
Jurisdiction	3
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
STATEMENT OF THE CASE	4
The Facts	5
The Decision Below	10
Reasons for Granting the Writ	12
I. The Oklahoma Decision Is In Error	13
A. The decision below conflicts with the teachings of *Cox* and *Nebraska Press Association*	13
B. The press cannot be compelled to waive due process in order to vindicate its right to publish	17
II. The Decision Below Has a Profound Impact on Our System of Freedom of the Press	21
CONCLUSION	24

TABLE OF AUTHORITIES

Page

Cases:

Carroll v. Princess Anne,
393 U.S. 175 (1968) 13

Cox Broadcasting v. Cohn,
421 U.S. 469 (1975) 2, 4, 10, 14, 15, 16, 17

Craig v. Harney,
331 U.S. 367 (1947) 15

Groppi v. Wisconsin,
400 U.S. 505 (1971) 18, 21

In re Gault,
387 U.S. 1 (1961) 10, 15, 16

Haynes v. Mayor and Council of Borough
of Oradeil, 96 S. Ct. 1755 (1976) 19

Ithaca Journal News, Inc. v. City Court,
294 NYS 2d 558 (1968) 11

Morgan v. United States,
318 U.S. 1 (1938) 19

Near v. Minnesota,
283 U.S. 697 (1931) 13

Nebraska Press Association v. Stuart,
97 S. Ct. 2971 (1976) 2, 4, 13, 14, 15, 16, 20, 21, 22

New York Times Co. v. United States,
403 U.S. 713 (1971) 14

Reynolds v. Sims,
377 U.S. 533 (1964) 19

Page

Roth v. United States,
354 U.S. 476 (1957) 14

Smith v. People,
80 S. Ct. 215, 31 U.S. 147 (1959) 19

Stroble v. California,
343 U.S. 181 (1951) 15

United States v. Dickinson,
465 F.2d 496, aff'd after remand,
476 F.2d 373; cert. den., 414 U.S.
979 (1973) 12, 18, 20

Virgin Islands v. Brodhurst,
285 F. Supp. 831 (D. St. Croix, 1968) 11

White Stag Mfg. Co. v. Ted R. Mace,
47 OBAJ 1113 and 47 OBAJ 2226 (1976) 19

Winters v. New York,
333 U.S. 507 (1948) 19

Statutes:

10 OS 1971 §1104-1108 5

10 OS 1976 Supp. §1107-1112 5

10 OS 1971 §1125 6

Article 2, §22 of Constitution of Oklahoma 8

Miscellaneous:

Levy, Legacy of Suppression, 176-249
(Harper & Row, 1963) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

THE OKLAHOMA PUBLISHING COMPANY,
a corporation,

Petitioner,

v.

THE DISTRICT COURT OF OKLAHOMA COUNTY,
and THE HONORABLE CHARLES E. HALLEY, Acting
Associate District Judge thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO: THE SUPREME COURT OF THE STATE OF OKLAHOMA

The Oklahoma Publishing Company ("Petitioner") respectfully prays that this honorable Court issue a Writ of Certiorari to the Supreme Court of the State of Oklahoma to review the above-captioned decision which upheld the

imposition of a prior restraint upon Petitioner's right to continue to publish information concerning juvenile proceedings pending in the state courts. This petition is filed following the entry of an Order by this Court staying the decision below (A-423, issued November 24, 1976). The decision of the Oklahoma Supreme Court holds that even in the absence of any legitimate concern about publicity prejudicial to a defendant's rights, the press may be prohibited from publishing information already broadly disseminated on grounds that such publication conflicts with the "right of rehabilitation" of the juvenile; the decision further holds that this extraordinary constraint was validly imposed upon Petitioner despite palpable defects in its issuance, as the result of which Petitioner may be the only news instrumentality bound by it.

This case does not involve the broad question whether the First Amendment accords the media an unrestricted right of access to all judicial proceedings. Nor does it involve the question whether the First Amendment immunizes the media from punishment for publication of information unlawfully obtained. The narrower question presented by this case is nevertheless novel and fundamental: whether the First Amendment countenances a prior restraint upon the publication of information broadly disseminated and lawfully obtained solely because the underlying proceedings are subject to *in camera* treatment under state law. The court below apparently is of the view that this question was not conclusively determined by this Court's decisions in *Nebraska Press Ass'n v. Stuart*, 97 S. Ct. 2971 (1976) and *Cox Broadcasting Corp. v. Cohn*, 421 U.S. 469 (1975). In light of its fundamental importance to the maintenance of a free and effective press, it is one which urgently requires consideration by this Court. Indeed, the case may be one appropriate for summary reversal.

OPINIONS BELOW

The "Pretrial order," the "Modification of Pretrial Order" and "Order Upon Special Appearance and Application of the Oklahoma Publishing Company to Quash and Vacate the PreTrial Order" (all unreported) are printed at Appendices A-1, A-2, A-3, respectively. The decision of the Oklahoma Supreme Court affirming the Pretrial order (unreported) is reproduced at Appendix B. The Oklahoma Supreme Court's subsequent order denying stay of its decision and the Order of this Court entered November 24, 1976 imposing the stay are reproduced at Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A. Whether the First and Fourteenth Amendments prohibit the state judiciary from imposing direct prior restraints on information lawfully obtained in court proceedings which may be *de jure* closed, but are *de facto* open to the public?

B. Whether the First and Fourteenth Amendments permit a state judiciary to compel waiver of jurisdiction and due process as a prerequisite to challenging a judicially imposed ban on publication?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under the First and Fourteenth Amendments to the United States Constitution and this Court's

decisions thereunder. The Oklahoma statutes involved include 10 O.S. 1971, § 1101, *et seq.* and 10 O.S. 1976 Supp., § 1101, *et seq.* Copies of such statutes are reproduced at Appendix D.

STATEMENT OF THE CASE

Petitioner is the owner of, *inter alia,* three newspapers in Oklahoma City (Oklahoma County), a morning daily – *The Daily Oklahoman,* an afternoon daily – *The Oklahoma City Times,* and a Sunday morning paper – *The Sunday Oklahoman.* Respondents are the District Court of Oklahoma County and The Honorable Charles E. Halley, Acting Associate District Judge thereof.[1]

This case arises out of the "Pretrial Order" entered by Respondent in a juvenile proceeding styled *In the Matter of Larry Donnell Brewer.* This pretrial order prohibits Petitioner from "publishing the name or picture" of an eleven-year-old child arrested by Oklahoma officials as a suspect in a shooting death of a railroad switchman. Affirming the Order, the Oklahoma Supreme Court has carved a broad and hitherto unprecedented exception to the teachings of this Court that prior restraints upon the reporting of judicial proceedings are presumptively invalid. It held that, even in the absence of any prejudice to a fair trial, the rights of rehabilitation of a juvenile prevail over the right of the Press to report information publicly obtained.

---

[1] The Respondent has been represented throughout all appellate proceedings by the attorney for the juvenile, Larry Spears, Esq. Mr. Spears has also filed an appearance with the U.S. Supreme Court on behalf of the Respondent concerning this matter.

The federal questions sought to be reviewed were first raised by Petitioner in Petitioner's "Special Appearance and Application of The Oklahoma Publishing Company to Quash and Vacate 'Pretrail Order' of August 3, 1976." Petitioner argued that Respondent's Order violated Petitioner's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution and the general laws of the State of Oklahoma. We ask this Court to decide whether the First Amendment and this Court's decisions in *Nebraska Press Ass'n* and *Cox, supra,* admit of the absolute and sweeping exemption invented below which authorizes the imposition of prior restraint in certain types of judicial proceedings; and whether the press can be compelled to lose its right to publish by seeking to vindicate it, as that court has concluded.

The Facts. The factual background leading up to the issuing of the Pretrial Order is as follows:

1. On the afternoon of July 26, 1976, a railroad switchman was fatally shot in Oklahoma County as he stood on the platform of a moving switch engine. The fact of the railwayman's killing was published and broadcast that afternoon and the next morning by the Petitioner and various other news organizations.

2. On July 27, it was reported and published that a Larry Guy had been taken into custody for the offense. But, the investigation later focused on a Larry Donnell Brewer who appeared at a detention hearing (10 O.S. 1971, §§ 1104-1108 and 10 O.S. 1976 Supp., §§ 1107-1112) on July 28 in Oklahoma County Juvenile Court before Special Judge Michael Tullius on charges filed by the Oklahoma County Juvenile Bureau alleging delinquency by

second-degree murder in the shooting of this switchman.[2] Newsmen, including one from Petitioner's newspaper, present in the courtroom during the detention hearing, learned the name of the juvenile. As the juvenile was escorted from the Oklahoma County Courthouse to a vehicle, Petitioner's newsmen took the juvenile's photograph in an alleyway that, by long custom and usage, was used as a public thoroughfare both for autos and pedestrians. The state authorities accompanying the juvenile raised no objections during the picture-taking, nor immediately afterwards. Thereafter, Petitioner printed stories using the juveniie's name and his photograph. Newsmen from other newspapers, radio and television stations also attended the detention proceeding. The story was widely disseminated by these other media, as well.

3. On August 3, the attorney for the juvenile filed a motion for a "Pretrial Order."[3] On the same day, after holding an unannounced and closed hearing upon the motion, the Respondent issued a "Pretrial Order" prohibiting "all members of the news media . . . from publishing, broadcasting, or disseminating in any manner, the name or picture of said minor child in connection with this pending case." Petitioner received no notice that this hearing was to be held. As far as Petitioner has been able to learn, no evidence was received at this hearing, no transcript of any kind made of it, and the only persons present were

[2] Judge Tullius set bond at $10,000, ordered the juvenile to be held in custody at a detention center and announced that the juvenile would be arraigned at 9:00 a.m. August 4th.

[3] This filing was made under Oklahoma Juvenile Statutes (10 O.S. 1971, § 1125) and was not open to the public.

Respondent, the juvenile and his attorney. At the hearing, the juvenile was arraigned. The Respondent specifically ruled that the trial would be held *in camera*.[4]

4. The only attempted service of the "Pretrial Order" on "members of the news media" was by the attorney for the juvenile. He asked his secretary to look in the yellow pages of the telephone book for the addresses of television stations, radio stations, and newspaper organizations in Oklahoma County. She sent copies of the "Pretrial Order" to these addresses by regular (not certified) mail, but made no list of those to whom copies were sent. When asked for a list, the attorney for the juvenile supplied Petitioner with copies of several pages from the telephone book. These pages had been marked by the secretary indicating her recollection of those to whom she remembered mailing copies of the "Pretrial Order." Fifty-two names and addresses were circled by the secretary.

5. Through August 5th, news organizations continued to report on the news story, including the now discovered closed hearing. These stories again specifically identified the juvenile by name. Petitioner's last news story identifying the juvenile by name appeared in *The Daily Oklahoman* of August 5th (prepared for publication the night before). A copy of the Pretrial Order reached Petitioner's City Editor the morning of August 5th.

6. Because the mailings of the Pretrial Order were to general corporate addresses and because no explanatory letter accompanied it, entities receiving copies of the Pretrial Order were confused by its patent ambiguity. Petitioner's news editor routinely set the Pretrial Order aside

[4] The Trial was scheduled for September 23, 1976.

for the reporter covering the juvenile's case. Later, upon closer scrutiny, the Pretrial Order was referred to Petitioner's attorneys. One newspaper, *The Norman Transcript* (a Cleveland County newspaper), ran a verbatim copy of the Pretrial Order under its legal notices column of August 6th – including the full name of the juvenile suspect which appeared in the style of the Order!

7. On August 10, 1976, Petitioner filed a "Special Appearance and Application" to quash and vacate the Pretrial Order. On August 16, Respondent held a hearing on Petitioner's request for relief. On motion of counsel for the juvenile, this hearing was held open (Transcript of the hearing, pp. 2-3) and the press attended. Later in the hearing, however, Respondent instructed the press not to print information developed in the course of the hearing (Transcript of hearing, pp. 49-53).

8. Respondent held that Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution were not violated by the procedures in this case because it would have been "impractical" to have provided Petitioner and others to be enjoined with prior notice and personal service of the order; and that the juvenile's "right to rehabilitation" took precedence over Petitioner's rights under the First Amendment to the United States Constitution, as well as Article 2, § 22 of the Constitution of Oklahoma.[5] Respondent also construed the language of the pretrial order: recognizing that, by its

[5] The attorney for the juvenile made several offers of proof that if certain psychiatrists were called to testify, they would say under oath that the publication of the juvenile's name would be harmful. It was not shown that the juvenile's rights to a fair trial under the Sixth Amendment would be prejudiced thereby.

(cont'd)

terms, the order was limited only to the name and photograph of the juvenile, Respondent said that, in order to avoid consequences which "thwart the intent and purpose of the order . . . it applies as well to facts which might lead to the identity of the juvenile" (Transcript of Hearing, p. 52).

9. On August 17, Petitioner made Application for Original Jurisdiction and Writ of Prohibition and of Mandamus to the Oklahoma Supreme Court. On October 19, 1976, the Oklahoma Supreme Court denied Petitioner's Writ of Prohibition and Mandamus. During the pendency of Petitioner's appeal to the Oklahoma Supreme Court, the juvenile was found to be delinquent by reason of second-degree manslaughter in the slaying of the switchman. This hearing was held on September 23. On November 19, 1976, the Oklahoma Supreme Court denied Petitioner's Application for Stay.[6] On November 24, 1976, this Court entered an Order staying the decision below. Also, on November 24, the disposition hearing was continued by order of the Respondent to January 12, 1977 and the juvenile was ordered to remain in the custody of his natural father. The stay

5 (cont'd)

The Respondent's Pretrial Order also prohibited the prosecutors and the defense from discussing the case (paragraphs 4 and 5), but this portion of the "Pretrial Order" was "rescinded" at the instance of the Oklahoma District Attorney. The Respondent's "Modification of Pretrial Order" was filed August 19. (See App. A-2)

[6] Petitioner had earlier made application to the United States Supreme Court for a stay in the matter. This Court denied that stay "for failure to comply with Rule 27" but "without prejudice to reapplying for an appropriate order should compliance with Rule 27 be effected."

having then been entered by this Court, Petitioner reported the facts and circumstances, including the name of the juvenile, resulting from the November 24 hearing.

The Decision Below. The Oklahoma Supreme Court recognized that the gag order entered by the District Court did not rest upon any necessity to assure the juvenile's Sixth Amendment rights to an unbiased trial. Stating that "no findings were made that a fair trial was otherwise unobtainable nor were other alternatives to prior constraints" considered prior to the entry of the order, it expressly held that the "barriers against the use of prior restraint . . . were not overcome." (App. B, p. 15a)

Instead, it asserted that the issue is whether the Oklahoma statutes which provide that juvenile proceedings shall be held in private unless specifically otherwise ordered by the presiding judge "prevail over the constitutional right of freedom of the press." Conceding that this "direct confrontation" between the First Amendment rights of a free press and the asserted rights of a juvenile to anonymity "has never been directly faced by the United States Supreme Court," the Oklahoma Supreme Court held that Petitioner's rights under the First Amendment do not "prevail" against the juvenile's "right of rehabilitation" embodied in the state juvenile statutes and supported by *In re Gault*, 387 U.S. 1 (1961). It asserted that *Cox, supra*, is "inapplicable" because an Oklahoma statute "provides juvenile proceedings shall be held in private unless *specifically* ordered to be held in public." (Emphasis supplied by the Oklahoma Supreme Court), and because there is "no indication that the Judge distinctly and expressly ordered the hearing to be public."

The Oklahoma Supreme Court offered no explanation for its conclusion that the "right" of rehabilitation, if it exists, outweighs the right of the press to openly report judicial proceedings openly held. Instead, it purported to base this conclusion on the naked fact that the Oklahoma statutes permit juvenile proceedings to be held in private. It relied upon a District Court decision of the Virgin Islands in which a newspaper was punished for having published the name of a juvenile in defiance of a statute maintaining juvenile court records in secret and a decision by a New York State lower court which held on statutory nonconstitutional grounds that the press could *not* be restrained from publishing the identity of youthful offenders when their identity had been obtained prior to the sealing of the formal written information. *Ithaca Journal News, Inc. v. City Court*, 294 N.Y.S. 2d 558 (1968), and *Virgin Islands v. Brodhurst*, 285 F. Supp. 831 (D. St. Croix, 1968). It is difficult to understand precisely how these lower court decisions support the Oklahoma Supreme Court's assessment of the constitutional balance. Nevertheless, the Oklahoma Supreme Court, finding the Oklahoma statute "broad enough" to support a prior restraint, held that the pretrial order was constitutional "in the interest of the possible rehabilitation of the youthful offender and his subsequent integration into society." (App. B, pp. 21-26)

The Oklahoma Court was equally untroubled by the procedures which resulted in the issuance of that Pretrial Order. Petitioner had persistently asserted that the trial court had no jurisdiction to enter a restraint on publication because it had never obtained *in personam* jurisdiction over Petitioner by proper service of process and because of other due process defects. The Oklahoma Court stated that it did not "find this argument persua-

sive": it relied upon Oklahoma law that when a party against whom a judgment is rendered filed a motion to vacate that judgment upon the merits, "he will be held to have entered his general appearance for all purposes." (App. B, p. 12). The Court did not consider the implications of its ruling in light of the decision in *United States v. Dickinson*, 465 F.2d 496, 509-10, aff'd. after remand, 476 F.2d 373; cert. den., 414 U.S. 979 (1973); it did not consider the consequences of delay inherent in the judicial process; it did not consider that some news services, which simply ignored the Pretrial Order, may not be bound by it.

Thus, the Supreme Court of Oklahoma sustained Respondent's order, imposing a prior restraint upon the dissemination of information publicly available and lawfully obtained; an order which is of virtually indefinite duration; an order which is applicable to no one except the press and may, indeed, be applicable only to Petitioner.

REASONS FOR GRANTING THE WRIT

The Decision below should be reviewed because it carves an unprecedented and untenable exception to the history of the First Amendment and the teachings of this Court, that the imposition of a prior restraint upon information openly obtained concerning judicial proceedings is presumptively invalid. *Nebraska Press Association, supra; Cox, supra.* The decision holds that, in the case of judicial proceedings which are subject to closure, the precedent of this Court are "inapplicable" and a restraint upon publication may be imposed upon information broadly disseminated and openly obtained. The Oklahoma Supreme Court

recognized that the question presented on this petition "has never been directly faced" by this Court. Certiorari should be granted because the Oklahoma Supreme Court Decision is in error and its ruling, although narrow in terms, is of profound importance to the maintenance of our system of freedom of expression.

I. THE OKLAHOMA DECISION IS IN ERROR.

A. *The decision below conflicts with the teachings of Cox and Nebraska Press Association.* It is no longer open to question that freedom of the press, guaranteed by the First Amendment, is protected from invasion by state action through the due process clause of the Fourteenth Amendment. *Near v. Minnesota,* 283 U.S. 697 (1931). It is equally beyond doubt that whatever else the First Amendment may do, it stands as a strong barrier against the imposition of a previous or prior restraint upon speech and publication – the "most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association,* Slip Opinion, p. 18; *Near v. Minnesota, supra,* at 713. See Levy, *Legacy of Suppression,* 176-249 (Harper & Row, 1963). In *Nebraska Press Association, supra,* this Court squarely held that the barrier against prior restraints is not limited to legislatively imposed restraints, but is equally applicable to orders entered by courts precluding publication of information concerning judicial proceedings held in public.

The rulings by this Court that a prior restraint "comes bearing a heavy burden against its constitutional validity," *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968), does

not create merely an evidentiary presumption freely subject to rebuttal. The presumptive invalidity of prior restraints is a substantive rule of law. It allows few, if any, exceptions. It has been suggested that the prohibition may be inapplicable to certain forms of expression – *i.e.*, obscenity – which may not be deemed to be speech (see, *e.g., Roth v. U.S.*, 354 U.S. 476 (1957) and that the ban may be overcome in cases involving national or common security. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Certain of the opinions in the *Nebraska Press Association* may be considered to hold that in "exceptional cases" a prior restraint upon the reporting of judicial proceedings is permissible. But, all the opinions are clear, this is so *only* when the consequence of publicity is the certain impairment of rights guaranteed to defendants under the Sixth Amendment and there is absolutely no other means of securing those rights. In any event, in the absence of publicity of such magnitude as to prejudice Sixth Amendment rights and in the presence of information openly obtained by the press in publicly held judicial proceedings, this Court has unanimously made plain that the barrier against the imposition of a prior restraint admits of no exception. *Cox, supra,* and *Nebraska Press Association, supra.*

We submit that neither the result nor the rationale below can be reconciled with these principles laid down by the terms of the First Amendment and delineated by this Court. The decision below does not rest upon any of the possible exceptions to the ban upon prior restraints heretofore recognized. It fashions a new one – that freedom to report juvenile proceedings can be enjoined even though the hearing is open and the information is already broadly disseminated, and even in the absence of any reason to believe that the publicity will impair the juvenile's Sixth

Amendment rights to a fair trial.[7] Moreover, the rationale below does not involve or even require an attempt to balance the consequences of publicity against asserted other state interests as this Court has commanded: purporting to balance the rights of the Press with those of the juvenile, the Court merely upholds the Order because under state law, the proceedings *may* be held in private. Under this reasoning, a prior restraint is presumptively *valid* in proceedings which may be – but are not – closed!

Even in the absence of precedent, this result could not be reconciled with the history or purpose of Freedom of the Press. The result is, moreover, flatly interdicted by this Court's decisions in *Nebraska Press Association* and *Cox*. The Oklahoma Supreme Court's attempts to distinguish those cases are unavailing:

(a) The Court below suggests that *Cox* is "inapplicable" because this is a juvenile proceeding under a statute providing for private hearings. Plainly, although they may be non-punitive, juvenile proceedings are nevertheless judicial proceedings; that is, indeed, the essential principle established by *In re Gault*, the very case upon which the Oklahoma Supreme Court relied. This Court's holdings in *Craig v. Harney*, 331 U.S. 367 (1947) and kindred cases apply. Neither *Cox Broadcasting* nor any of this Court's decisions recognizing the right of the Press to report on judicial proceedings hold that the extent of First Amendment protection depends upon the type of judicial proceeding involved. The barrier to prior restraints, rather,

---

[7] This Court has repeatedly stressed that pretrial publicity is not inherently or necessarily prejudicial. See, *e.g., Stroble v. California*, 343 U.S. 181 (1951).

is applicable to *all* judicial proceedings held publicly. *Cox, supra.*

(b) The Oklahoma Supreme Court's attempt to distinguish this case from *Cox* on grounds that there is no evidence that the detention hearing was "specifically ordered to be open" is equally untenable. The information here was obtained in an open courtroom and other public places with the full knowledge of the presiding judge, the prosecutor and defense counsel. The Oklahoma Supreme Court's assertion that the Press does not, at least arguably, have the right of an unrestricted access to Supreme Court conferences, to grand jury proceedings or to closed juvenile proceedings is simply irrelevant.[8]

For these reasons, even assuming that the dictum in *Gault, supra,* and the Oklahoma juvenile statutes represent the expression of some sort of a right of privacy – itself a large assumption – it is constitutionally impermissible for the Oklahoma Supreme Court to treat those statutes as a self-executing gag order which applies *nunc pro tunc* when the proceedings are, in fact, held in the open and before the press. First, any state interest in preserving the anonymity of the juvenile must be balanced against the right of the Press, *before* the gag order is entered. Secondly, the obligation is on the state to affirmatively close the proceeding. As this Court stated in *Cox:*

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully published information released

[8] For the same reason, the case does not involve the subsidiary issue whether the Press may be subjected to punishment or a prior restraint for the publication of information unlawfully obtained.

> to the public in official court records. *If there are privacy interests to be protected in judicial proceedings, the states must respond by means which avoid public documentation or other exposure of private information. Id.* at 496. (Emphasis added)

The reasoning of the Oklahoma Supreme Court inverts this principle. It places the burden on the Press, not the state, to preserve any rights of privacy which may exist in judicial proceedings. This is untenable: the Press would be required, at its peril, to speculate whether proceedings held publicly are open *de jure.* This is not the test contemplated by this Court in *Cox.*

It may be debated whether a judge can lock his courtroom, can order his bailiff to exclude persons and/or close his courtroom. The fundamental point is that, in the instant case, the judge at the detention hearing did none of these things.[9] And, once the State fails to take such steps, the Press cannot thereafter be prohibited from reporting what it learned in open court and public places. That is the essence of the decision in *Cox.* The decision below is thus in fundamental conflict with the principle of law that prior restraints upon publication of information lawfully obtained in judicial proceedings publicly held are invalid. It is in error.

B. *The Press cannot be compelled to waive due process in order to vindicate its right to publish.* In *Nebraska Press Association* this Court recognized that there is an inextricable relationship between procedural due process and the

[9] It is significant that Respondent (to paraphrase the Oklahoma Supreme Court) "specifically ordered" that the trial be held *in camera.* See discussion, *supra,* at p. 7.

imposition of prior restraints upon the Press. *Nebraska Press Association* at 2806. The court below has avoided these difficulties by the simple expedient of holding, in substance, that because Petitioner challenged the gag order on its merits as well as on grounds of lack of jurisdiction in the district court, it waived its rights to procedural due process. We may grant that, under Oklahoma law, an appearance on the merits is treated as a general appearance, but we submit that such a state requirement must yield to the greater need that the Press be able promptly to vindicate its rights under the First Amendment without entrapment. *Cf. Groppi v. Wisconsin*, 400 U.S. 505 (1971).

U.S. v. Dickinson, supra, holds that a newspaper must seek relief from a gag order in the courts or expose itself to punishment for contempt of even an illegal order. But, the decision below holds that if a publisher, in obedience to *Dickinson*, seeks to challenge the prior restraint on its merits, it waives its entitlement to claim that the court is without jurisdiction and that the procedures followed were invalid. The two decisions create a Hobson's Choice for the Press: if they ignore a prior restraint, they may be held in contempt; if they challenge it, as Petitioner has done, they are bound by it.

Plainly, the procedures followed below were of questionable validity:

1. Neither Petitioner nor any of the other media was a party to the lawsuit out of which the Pretrial Order arose. They received no notice that a Motion for Pretrial Order had been filed or that a hearing was set, nor were they present at the hearing out of which the Pretrial Order was issued. Indeed, Petitioner did not even receive a copy of the Motion until after making application to the

Oklahoma Supreme Court. None of this accords with the conduct of judicial proceedings consistent with minimum standards of due process. *Winters v. New York*, 333 U.S. 507 (1948); *Morgan v. U.S.*, 318 U.S. 1, 18 (1938).

2. The service of the Pretrial Order is of questionable validity under state law. *White Stag Mfg. Co. v. Ted R. Mace*, 47 OBAJ 1113 and 47 OBAJ 2226 (1976).

3. The Pretrial Order facially leaves substantial doubt as to whom it is applicable: it is initially addressed to "all members of the news media"; but it provides that copies of the order are to be sent only to "all newspapers, television stations and radio stations that disseminate news within Oklahoma County." As a result, the Order may not be applicable to at least one category of the "news media" – magazines – and it may not apply to instruments of the Press who are not located there but "disseminate news" within Oklahoma County through isolated distribution of their publications or by broadcasts. In terms of the stated purpose of the Pretrial Order, these are patently arbitrary and invidious distinctions. *Cf. Reynolds v. Sims*, 377 U.S. 533 (1964).

4. The Pretrial Order literally applies only to the "name and photograph" of the juvenile. The Respondent, however, construed this very limited prohibition to apply to any other "facts which might lead to the identity of the juvenile." The Press is left with no means of knowing what the order permits or what it forbids. This in itself is constitutionally intolerable: "stricter standards of permissible statutory vagueness may be applied to a statute [or a judicial injunctive order] having a potentially inhibiting effect on speech." *Smith v. People*, 80 S. Ct. 215, 217-218, 361 U.S. 147, 151 (1959); see *Hynes v.*

Mayor and Council of Borough of Oradell, 96 Sup. Ct. 1755, 1760 (1976).

The Oklahoma Supreme Court avoided all of these difficulties by simply holding that Petitioner had waived them.[10] The end result of the rationale below may be that only Petitioner is bound by an Order which does not identify those to whom it applies or that which it forbids.

This is a necessary consequence of the application of Oklahoma's rule treating appearances on the merits as appearances for all purposes. The Oklahoma Supreme Court impliedly suggests that Petitioner could have bypassed Respondent and immediately sought relief with the Oklahoma Supreme Court. Even if such an approach were legally permissible, judicial courtesy indicated that Petitioner present its substantive arguments in the first instance to the issuing court which had not previously heard Petitioner's views and thereafter seek review. Nor was it feasible for Petitioner to limit its initial appearance to the jurisdictional issues, and thereafter raise the substantive question. Throughout the entire interval, Petitioner would have been required to obey the gag order. *Dickinson, supra.* But this is a case involving a prohibition on freedom of the press in which "delay inherent in judicial proceedings could itself destroy the contemporary news value of the information the Press seeks to disseminate." *Nebraska Press Association, supra,* at 2826-7. The Oklahoma Supreme Court ignored the practical realities of the case.

---

10 Petitioner rejected the suggestion of the Nebraska Supreme Court that it could ignore the Pretrial Order. (*Nebraska Press Association, supra,* at 2806, fn. 5.) It challenged the Pretrial Order in the courts because it believed it was compelled to do so under *U.S. v. Dickinson.*

We do not ask this Court to establish the proper procedures under state law for the issuance by the state judiciary of an order which bars publication by the Press. We do submit that the First and Fourteenth Amendments forbid the state judiciary from adopting procedures which require the Press to waive claims of jurisdiction and due process as a prerequisite to vindication of its rights under the First Amendment. The approach taken below may vastly simplify the issuance of prior restraints on the Press, but it denies Due Process and is, for that reason, an unconstitutional infringement on speech. *Nebraska Press Association, supra; Groppi, supra.*

II. THE DECISION BELOW HAS A PROFOUND IMPACT ON OUR SYSTEM OF FREEDOM OF THE PRESS.

The decision below creates an enormous potential for abuse:

First, unlike the prior restraint involved in the *Nebraska Press* case which was of definite and limited duration, the gag order approved here is not self limiting. The Respondent stated that it will remain in effect until the juvenile reaches majority.[11] That may be consistent with the rationale upon which the order was ultimately sustained by the Oklahoma Supreme Court, but it opens up the potential for serious miscarriage of justice, which scrutiny of judicial proceedings by the Press is intended to prevent: the juvenile may languish in jail for the commission of a

---

11 For this reason, if no other, *cf. Nebraska Press Association, supra,* at p. 2797, the question of mootness of the Pretrial Order does not arise in this case. Moreover, as in *Nebraska Press Association,* this type of Order is certainly "capable of repetition." *Id.* at 2797.

minor offense or be prematurely released for the commission of a major one, but the Press will be silenced.

Second, because the decision rests upon novel grounds, the Court apparently felt free to release everyone except the Press from the restraint of the order. The prosecutor and defense counsel are, under the Modified Order (see App. A-2), free to discuss the juvenile's name (as well as "facts which might lead to the identity" – or might misidentify – the juvenile)[12] with whomever they choose; but the Press cannot report. The attempt by the court below to temper the scope of its holding by suggesting that the media should be allowed to attend the proceedings but not report them is meaningless: the naked privilege to attend judicial proceedings held in the open does not diminish the dangers that, because the Press is muzzled, a miscarriage of justice may occur.

Third, precisely because the order does not rest upon any asserted need to vindicate the Sixth Amendment rights of the juvenile, the court below gave no consideration to the balancing factors deemed relevant by this Court in *Nebraska Press Association, supra,* at 2804. The Oklahoma Supreme Court made no effort to assess the "nature and extent of pretrial news coverage"; under the decision below, even a single story on the last page of the paper would suffice to trigger the imposition of the prior restraint. The state courts made no attempt to determine "whether other measures would be likely to mitigate the effects of

---

12 Under the decision below, the Press would not have been able to report that the investigation had shifted from Larry Guy to Larry Donnell Brewer.

unrestrained pretrial publicity"; or to determine "how effectively a restraining order would operate." In fact, because the information was already broadly disseminated, the order was almost of necessity ineffective: anyone wishing to learn the juvenile's name need only go to a local library which catalogs Petitioner's newspapers!

Fourth, under the rationale below, there is no need to weigh the rights of the Press against other state interests, legitimate or otherwise. Without any assessment of the conflicting considerations and in reliance upon two lower court decisions which do not support it,[13] the Oklahoma Supreme Court simply concluded that the state interest "prevails" over the First Amendment rights of the press. On that rationale, state interests, real or imagined, will *always* prevail over the First Amendment.

Unless the decision below is overturned, prior restraints in any judicial proceeding which is merely subject to closure will become commonplace. They will be of indefinite duration; they will apply to the Press and no one else. These, we submit are circumstances which this Court should not allow to happen.

---

13 As we have noted, in one of the cases relied upon by the Oklahoma Supreme Court the order was held impermissible. The other involved publication of information unlawfully obtained, an issue which is simply not present here.

CONCLUSION

The questions presented by this case are of great and recurring significance. For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted to review the opinion of the Supreme Court for the State of Oklahoma. Indeed, summary reversal may be appropriate.

Respectfully submitted,

MICHAEL MINNIS
RAINEY, WALLACE, ROSS & COOPER
735 First National Center West
Oklahoma City, Oklahoma 73102
(405) 235-1356
Counsel for Petitioner

Of Counsel
RICHARD M. SCHMIDT, JR.
IAN D. VOLNER
COHN & MARKS
1920 L Street, N.W.
Washington, D.C. 20036
(202) 293-3860

CERTIFICATE OF SERVICE

I, Ian D. Volner, hereby certify that I have, this 23rd day of December 1976, sent by First Class Mail, postage prepaid, a copy of the foregoing "Petition for Writ of Certiorari to: The Supreme Court of the State of Oklahoma" to the following:

Larry M. Spears, Esq.
217 North Harvey
Suite 103
Investors Capital Building
Oklahoma City, Oklahoma 73102

Ian D. Volner

APPENDIX A-1

IN THE DISTRICT COURT
IN AND FOR OKLAHOMA COUNTY

STATE OF OKLAHOMA

IN THE MATTER OF	)	* * *
	)	
LARRY DONNELL BREWER	)	NO: JF-76-872
	)	
A child under eighteen years of age.	)	

PRETRIAL ORDER

NOW, on this 3rd day of August, 1976, the above entitled matter duly comes on for hearing upon the Motion for Pretrial Order filed herein on behalf of the above named minor child, Larry Donnell Brewer. And the Court, having read said Motion for Pretrial Order, having heard the statement of counsel, and being fully advised in the premises, finds as follows: Oklahoma law, as set forth in Title 10, Oklahoma statutes, requires juvenile proceedings concerning delinquency to be kept confidential. The Juvenile Court is also concerned with the adverse effect that pretrial publicity may have upon the juvenile, himself, as well as the affect it may have upon his right to a fair, orderly, and impartial trial. The Court notes that this case has already attracted substantial publicity in the media. The Court therefore finds and concludes that, by reason of the particular circumstances of this case, certain orders and restraints are necessary to guarantee the confidentiality of the proceedings as required by law, to protect the rights and welfare of the juvenile, and to assure a fair, orderly, and impartial trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that all law enforcement officers, records personnel, and other employees of law enforcement agencies be, and they hereby are, restricted, enjoined and restrained from disclosing any information or making any comments concerning the above entitled cause to anyone, other than to each other, or to the Juvenile Bureau, or to the District Attorney's office, or to counsel for said minor, and as otherwise necessary in the performance of their official duties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that all employees of the Oklahoma County Juvenile Bureau be, and hereby are, restricted, enjoined and restrained from releasing any information or making any comments concerning this case to anyone, other than to each other, or to the District Attorney's office, or to counsel for said minor, or to law enforcement employees, or as otherwise necessary in the performance of their official duties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the District Attorney of Oklahoma County, all assistant District Attorneys, and all employees of the office of the District Attorney of Oklahoma County be, and they hereby are, restricted, enjoined, and restrained from disclosing any information, or making any comments, concerning this case to anyone other than to each other, or to law enforcement personnel, or to counsel for said minor, or to Juvenile Bureau employees, and as otherwise necessary in the performance of their duties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that all attorneys involved in this case, specifically including all defense counsel, be, and

they hereby are, restricted, enjoined and restrained from disclosing any information, or making any comments, to anyone other than to each other, or to employees and personnel in law enforcement, the Juvenile Bureau, the District Attorney's office, and as otherwise necessary in the performance of their duties.

IT IS FINALLY ORDERED, ADJUDGED AND DECREED by the Court that all members of the news media be, and they hereby are, restricted, enjoined and restrained from publishing, broadcasting, or disseminating, in any manner, the name or picture of said minor child in connection with this pending case. In conjunction herewith, it is ordered by the Court that certified copies of this Order be mailed to all newspapers, television stations, and radio stations that disseminate news within Oklahoma County; and that the receipt by the principal corporate office of each such news entity shall constitute service, and be binding upon, each and all of the officers and employees of such entity. Likewise, certified copies hereof may be mailed to the Juvenile Bureau, the office of the District Attorney, and the various law enforcement agencies, and upon receipt thereof, this Order shall be binding upon each and all of the personnel and employees of such governmental agencies or departments.

/s/ Charles E. Halley
Judge

APPROVED:
BAY, HAMILTON, RENEGAR, LEES & SPEARS
Attorneys for Larry Donnell Brewer
* * * /s/ Larry M. Spears
LARRY M. SPEARS

APPENDIX A-2

IN THE DISTRICT COURT
IN AND FOR OKLAHOMA COUNTY

STATE OF OKLAHOMA

IN THE MATTER OF	)	* * *
	)	
LARRY DONNEL BREWER	)	NO: JF-76-872
	)	
A child under eighteen years of age.	)	
	)	

MODIFICATION OF PRETRIAL ORDER

NOW ON THIS 5th day of August, 1976, there comes on before the undersigned Judge the Motion of Andrew M. Coats, District Attorney of Oklahoma County, Oklahoma, to modify the Pretrial Order as issued by the Court on the 3rd day of August, 1976. Larry M. Spears and Arthur S. Bay of the law firm of Bay, Hamilton, Renegar, Lees & Spears, appear on behalf of the child and the State of Oklahoma appears through Andrew M. Coats, District Attorney of Oklahoma County, Oklahoma. Both sides announce ready, and the Court, after having reviewed the file, having heard the statements of counsel and being otherwise fully advised, finds that both sides are in agreement as to the rescinding of that portion of the Pretrial Order that concerns the District Attorney of Oklahoma County and defense counsel. The Court further finds that at the present time there is no evidence to indicate that the juvenile will not be sufficiently protected by the canons of ethics of the Oklahoma Bar Association, as concerns the restraint of the District Attorney and defense counsel, and

so far as the Pretrial Order affects the District Attorney and defense counsel the Court finds that such order is unnecessary and therefore Paragraphs number four (4) and five (5) are hereby rescinded. The Court further finds that it is in the best interest of the juvenile that the Pretrial Order stand as is, except as hereinabove modified, for the reason that the Court is interested in preverving the anonymity of the juvenile and that therefore, the Order prohibiting further publication of the juvenile's name or further publication of the juvenile's picture shall remain in full force and effect.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Pretrial Order of August 3, 1976, is hereby modified by rescinding numerical paragraph number four (4) concerning the District Attorney of Oklahoma County, and numerical paragraph number five (5) concerning defense counsel.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Pretrial Order, except as hereinabove modified, shall remain in full force and effect.

/s/ Charles E. Halley
JUDGE CHARLES E. HALLEY
Judge of the District Court

APPROVED:
BAY, HAMILTON, RENEGAR,
LEES & SPEARS
Attorneys for Juvenile,
Larry Donnell Brewer

By: /s/ Larry M. Spears
LARRY M. SPEARS

ANDREW M. COATS,
District Attorney
Oklahoma County, Oklahoma

By: /s/ Andrew M. Coats
ANDREW M. COATS

APPENDIX A-3

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

/s/ Larry Donnell Brewer

IN THE MATTER OF A	)	* * *
JUVENILE, a child under	)	NO: JF-76-872
eighteen years of age.	)	

ORDER UPON SPECIAL APPEARANCE AND
APPLICATION OF THE
OKLAHOMA PUBLISHING COMPANY
TO QUASH AND VACATE PRETRIAL ORDER
OF AUGUST 3, 1976

This matter came on for hearing on the 16th day of August, 1976, upon the Special Appearance and Application of The Oklahoma Publishing Company to Quash and Vacate the Court's Pretrial Order of August 3, 1976.

Appearing for the juvenile in this matter was his attorney, Larry M. Spears, appearing for the applicant, The Oklahoma Publishing Company, were their attorneys, Michael Minnis and William J. Ross.

After receiving into evidence certain stipulations, offers of proof, the testimony of Kay Dyer and representative David Hood, hearing the argument of counsel and being further advised in the premises, finds that summons and service and the naming of the particular media to be enjoined would be impractical and that the Pretrial Order is necessary to protect the juvenile's right to rehabilitation;

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED by this Court that the Special Appearance and Application of The Oklahoma Publishing Company to Quash and Vacate this Court's Pretrial Order of August 3, 1976, was overruled and the Order remained in full force and effect.

To which order applicant excepted and exception allowed;

Whereupon, applicant gave oral notice of intention to file application for original jurisdiction with the Oklahoma Supreme Court for writ of prohibition and writ of mandamus.

Dated this 17th day of August, 1976.

/s/ CHARLES E. HALLEY
CHARLES E. HALLEY
JUDGE OF OKLAHOMA COUNTY DISTRICT COURT

APPROVED BY:

BAY, HAMILTON, RENEGAR, LEES & SPEARS

* * * [Clerk's (Dan Gray) Certification]

BY /s/ Larry M. Spears
LARRY SPEARS, Attorneys for Juvenile

* * * [/s/ Marilyn Lee, Deputy]

RAINEY, WALLACE, ROSS & COOPER

BY /s/ Michael Minnis
MICHAEL MINNIS
735 First National Center West
Oklahoma City, Oklahoma 73102
ATTORNEYS FOR THE OKLAHOMA PUBLISHING COMPANY

APPENDIX B

[FOR OFFICIAL PUBLICATION]

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

THE OKLAHOMA PUBLISHING COMPANY, a corporation, Petitioner,	)	
v.	)	No. 50,052
THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA, and the HONORABLE CHARLES E. HALLEY, Acting Associate District Judge thereof, Respondents.	)	FILED * * * Oct.19, 1976

APPLICATION TO ASSUME ORIGINAL JURISDICTION
AND
PETITION FOR WRITS OF MANDAMUS
AND PROHIBITION

Original proceeding involving application to assume original jurisdiction, and petition for writs of prohibition and mandamus to prevent the respondent judge from exercising a prior restraint on publication of the name and photograph of a juvenile charged with delinquency because of the alleged commission of second degree murder.

ORIGINAL JURISDICTION ASSUMED
WRITS OF PROHIBITION AND MANDAMUS DENIED

Michael Minnis
of
Rainey, Wallace, Ross & Cooper
Oklahoma City, Oklahoma — For Petitioner,

Larry M. Spears
of
Bay, Hamilton, Renegar, Lees & Spears
Oklahoma City, Oklahoma — For Respondents.

HODGES, V.C.J.

This is an application to assume original jurisdiction and petition for writs of prohibition and mandamus. The Petitioner, The Oklahoma Publishing Company, seeks to prevent the respondent judge from utilizing a "gag rule" in juvenile court proceedings. The juvenile is an eleven-year old child who is charged with delinquency because of the alleged commission of second degree murder. This application arose as the result of a pre-trial order entered by the judge imposing a prior restraint on publication of the juvenile's name or photograph. Because of the nature and importance of this case and the inevitability of the recurring problem, we believe it is necessary and expedient to assume original jurisdiction to discuss the constitutional questions presented, and to issue directives for collaboration and cooperation between the press, the bench and the bar for future juvenile proceedings.

On the afternoon of July 26, 1976, a railroad switchman was fatally shot in Oklahoma County as he stood on the platform of a moving switch engine. The story was

published and broadcast that afternoon and the next morning by the petitioner and various other Oklahoma news organizations, with the speculation that the switchman was apparently killed by a sniper. A twelve-year old boy was taken into custody as a suspect in the killing July 27, 1976. The arrest of the suspect was reported and broadcast. The suspect was identified as "L.G." and his address was given. The next morning on July 28th, newspapers published stories that the twelve-year old suspect had been taken to Berry House Juvenile Detention Center and he was once again identified as "L.G." of the same address. On July 29, 1976, eleven-year old "L.B." appeared in an adjudication hearing on charges filed by the Oklahoma County Juvenile Bureau alleging delinquency as the result of the purported commission of second degree murder. Radio stations broadcast the name of the juvenile, television stations ran film footage of him and identified him by name, and newspapers within the county printed his name, photograph, and identified his parents.

A closed arraignment hearing was held August 3, 1976, and upon the motion of the attorney for the juvenile, the judge issued a pretrial order to all members of the news media enjoining the dissemination of the name or picture of the juvenile[1] in order to "guarantee the confidentiality of the proceedings as required by law, to protect the rights

---

[1] The order as it pertains to the petitioner, The Oklahoma Publishing Company, provides:

> "IT IS FINALLY ORDERED, ADJUDGED AND DECREED by the Court that all members of the news media be, and they hereby are, restricted, enjoined and restrained from publishing, broadcasting, or disseminating, in any manner the name or picture of said minor in connection with this pending case."

and welfare of the juvenile, and to assure a fair, orderly and impartial trial." Further stories on the case were published and broadcast on August 4, and the juvenile was again specifically identified. News organizations continued to comment on the hearing and pre-trial order. The last news story by petitioner, identifying the juvenile, appeared in The Daily Oklahoman August 5, 1976.

The petitioner asserts that the trial court had no jurisdiction to enter a restraint on publication because it had never obtained in personam jurisdiction over petitioner by proper service of process. We do not find this argument persuasive. The petitioner filed a motion to vacate the order of the trial court in which it challenged the jurisdiction of the court and also asked the court to determine non-jurisdictional issues requiring the court to rule on the validity of the order. Under Oklahoma law, the voluntary appearance of a party[2] is equivalent to service, and when a party against whom a judgment is rendered files a motion to vacate the judgment upon non-jurisdictional as well as jurisdictional grounds, he will be held to have entered his general appearance for all purposes.[3]

Next we are presented with two ultimate issues. The first is whether the trial court, in the absence of any evidence to support its finding, may impose a prior restraint on the news media in order to assure an impartial trial? This question was answered in the negative in the recent decision of the United States Supreme Court in the case of *Nebraska Press Association v. Stuart, 96 S. Ct. 2791, 2801 (1976).* The Court held an order restraining the

---

[2] 12 O.S. 1971 § 162.

[3] *Daniel v. Daniel, 348 P.2d 185, 186 (Okla. 1959).*

news media in a public criminal trial of an adult was a violation of the constitutional guarantee of freedom of the press, and that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights. The Court said:

> "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom . . . of the press' and it is 'no longer open to doubt that the liberty of the press and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.' *Near v. Minnesota, 283 U.S. 697, 707 (1931).* See also *Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).* The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information and commentary – orders that impose a 'previous' or 'prior' restraint on speech."

The Court determined the press had the right to gather information, and required the trial judge to employ other precautionary measures, other than a prior restraint on publication, to insure a fair and impartial trial.[4] Although the Court in *Nebraska Press Association,* acknowledged in some instances a prior restraint might be permissible, it held the presumption against the use of a "gag rule" is a difficult obstacle to surmount, at p. 2808 the Court said:

---

[4] The measures suggested by the Court in *Nebraska Press Association, 96 S. Ct. 2791, 2800 (1976)* include the alternatives discussed with approval in *Sheppard v. Maxwell, 384 U.S. 357, 361-62, 86 S. Ct. 1519-1522, 16 L. Ed. 2d 600, 619-20 (1966):* change of trial venue to a place less exposed to the intense publicity; post-

(cont'd)

"Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibits publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met."

---

4 (cont'd)

ponement of the trial to allow public attention to subside; use of searching questioning of prospective jurors by the trial judge to screen out those with fixed opinions as to guilt or innocence; the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court; and sequestration of jurors. These judicial controls also include the power of the trial court to proscribe extrajudicial statements by the lawyers, parties, witnesses, court officials or employees which divulge prejudicial matters; statements made by the accused to officials; the identity of witnesses or their probable testimony; any belief in guilt or innocence, or like statements concerning the merits of the case; and warnings to the media by the court as to the impropriety of publishing material not introduced into evidence and also the propriety of the remarks of the trial judge.

Pre-trial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial.[5] The portion of the pre-trial order as it related to insuring a fair trial is in error and unenforceable because no findings were made that a fair trial was otherwise unobtainable, nor were other alternatives to prior restraint contemplated. The barriers against the use of prior restraint of the freedom of the press were not overcome.

The second issue is more complex. A juvenile, not an adult, is involved, and the proceedings, rather than occurring in public in open court, are directed by statute to be held in private. The questions presented are whether Oklahoma law requires juvenile proceedings to be kept confidential, and if the trial court may consider the effect of pre-trial publicity on the juvenile and his rehabilitation? The pertinent Oklahoma statute, 10 O.S. 1971 § 1111 provides that juvenile proceedings are to be held privately unless the judge specifically orders the hearing to be held in public,[6] and 10 O.S. 1971 § 1125 provides that juvenile

---

5 *Nebraska Press Association v. Stuart, p. 2800, supra.*

6 10 O.S. 1971 § 1111 provides:

All cases of children shall be heard separately from the trial of cases against adults. The hearings shall be conducted in an informal manner, according to the rules of evidence, and may be adjourned from time to time. The hearings shall be private unless specifically ordered by the judge to be conducted in public, but persons having a direct interest in the case shall be admitted. Stenographic notes or other transcript of the hearings shall be admitted. Stenographic notes or other transcripts of the hearings shall be kept as in other cases, but they shall not be open to public inspection except by order of the court. A decision determining a child to come within the purview of this Act must be based on sworn testimony and the child must have the opportunity for cross-examination.

records are not open to inspection by the public unless ordered by the court.[7]

The juvenile code is geared to the philosophy of protecting a child's right to full physical, mental and moral development. The concept of the juvenile courts is that of *parens patriae*, the power of the state through the court to act in the behalf of the child as a wise parent would.[8] The ideology is that each child is a distinct individual entitled to help and treatment, not retribution from the community. The concept must, however, be balanced with the court's responsibility to protect the public from delinquent acts of children.[9] The specialists in this field, many of

---

[7] 10 O.S. 1971 § 1125 provides:

> This court shall make and keep records of all cases brought before it. Such records shall be open to public inspection only by order of the court to persons having a legitimate interest therein, except that all records of proceedings in adoption cases and all papers and books relating thereto shall remain confidential as provided by law. The court shall devise and cause to be printed such forms for social and legal records and such other papers as may be required.

[8] 10 O.S. 1971 § 1129 provides:

> This Act shall be liberally construed, to the end that its purpose may be carried out, to wit: That the care and custody and discipline of the child shall approximate, as nearly as may be, that which should be given by its parents, and that, as far as practicable, any delinquent child shall not be treated as a criminal.

[9] Reed, "Treating the Juvenile and Youthful Offender," Law Enforcement and the Juvenile Offender, pp. 57-60 (Charles C. Thomas 1963).

whose treatises were referred to by the United States Supreme Court in *In Re Gault, 387 U.S. 1, 25, 87 S. Ct. 1428, 18 L. Ed. 2d 527, 544 (1967),* are virtually unanimously in favor of protecting from publicity the child brought under the jurisdiction of the juvenile court.[10]

The trial judge in the case before us acted responsibly, out of a legitimate concern to protect the juvenile's right not only to a fair, orderly, and impartial trial, but to prevent the adverse effect pre-trial publicity might have upon the juvenile. What we must decide is not simply whether the trial court erred in seeing the possibility of real danger to the juvenile's right to a fair trial in the absence of any findings to that effect, but whether under the circumstances of this case, the interpretation of 10 O.S. 1971 §§ 1111, 1125 and the means employed to insure the juvenile's right to anonymity were foreclosed by the First Amendment to the Constitution of the United States which provides "Congress shall make no law . . . abridging the freedom of speech or of the press," and the Okla. Const. art. 2 § 22 which provides "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . ."

The issue, then, is does the Oklahoma statute, 10 O.S. 1971 § 1111 which provides hearings shall be in private

---

[10] See Note, "Rights and Rehabilitation in the Juvenile Courts," 67 Col. L. Rev. 281, 285-86 (1967); Weis, "Publication of the Names of Juvenile Felons," 23 Mont. L. Rev. 141, 156-57 (1962); Handler, "The Juvenile Court and the Adversary System: Problems of Function and Form," 1965 Wis. L. Rev. 7, 13; Note, "Juvenile Delinquents: The Police, State Courts, and Individualized Justice," 79 Harv. L. Rev. 775, 784 (1966).

unless specifically ordered by the judge to be conducted in public, and 10 O.S. 1971 § 1125 providing for confidentiality of records, prevail over the constitutional right of freedom of the press as legislative enactments in harmony with the spirit of the Constitution which do not curtail the rights reserved by the Constitution to the people.[11]

In Re Gault, 387 U.S. 1, 25, 87 S. Ct. 1428, 18 L. Ed. 2d 527, 545 (1967) extended the constitutional safeguards of due process which had routinely been granted to adults to juvenile proceedings. The court stated that "under our Constitution, the condition of being a boy does not justify a kangaroo court." The question is whether the condition of being a boy warrants extension of rights in excess of those granted by the Constitution to all citizens. Although the precise question was not before the Court in *Gault*, it indicated no disapproval of the provisions of the Arizona Juvenile Code which shielded the child from publicity, and gave tacit approval to the juvenile's right to anonymity. The Court said:

> "In any event, there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles . . ."

---

11 *Thomas v. Reid, 142 Okla. 38, 285 P. 92 (1930)* provides:

> "All legislative enactments must be in harmony with the spirit of the Constitution, and no legislative act may curtail the rights reserved by the Constitution to the people."

Freedom of the press is not an unbridled right to publish any and all news regardless of its source or its effects. The rights of the press under the First Amendment and the Oklahoma Constitution must be balanced against the right of a juvenile to be spared from life long devastating effects of publicity for what might have been one irresponsible act caused by immaturity based on age alone. Where the line shall be drawn in a particular case rests, not on generalities, but on the concrete clash of particular interests and the state's relative evaluation of both of them, and how one will be affected by a specific restriction, the other by its absence.[12] The First Amendment right of the news media to reasonable access to the news may in certain circumstances be balanced against and outweighed by other legitimate state interests. There is no constitutional right to the unrestricted gathering of news, and the guarantee of the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. The media is reasonably excluded from grand jury proceedings, Supreme Court conferences, the meetings of other official bodies gathered in executive sessions, and meetings of private organizations. There is no constitutional right of access to the scenes of crime or disaster where the general public is excluded, and newsmen may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.[13]

---

12 See *Cantrell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352 (1940).*

13 *Branzburg v. Hayes, 408 U.S. 665, 684-85, 92 S. Ct. 2646, 2658, 33 L. Ed. 2d 626, 641 (1972).*

The argument for requiring juvenile proceedings to be confidential is that: exposure of a juvenile's record of delinquency would be likely to cause impairment of rehabilitative goals of the juvenile correction procedures which might encourage the juvenile offender to commit further acts of delinquency; cause the juvenile offender to lose employment opportunities, or otherwise suffer unnecessarily; bring undue humiliation upon his family because of his youthful transgressions; and that publicity may afford the hard core delinquent the kind of recognition he desires. The argument for freedom of the press to report juvenile proceedings is that the press is the watchdog of society and that if they are precluded by statute from reporting a matter of public interest, soon any judicial proceeding could be made subject to private proceedings, and a return to the star chamber would inure as the direct result of denial of the right of the press to unrestrainedly gather the news.[14]

Although the direct confrontation between the First Amendment rights of a free press and the right of a juvenile to anonymity has never been directly faced by the United States Supreme Court, in *Davis v. Alaska, 415 U.S.*

---

[14] Justice White concurring in *Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259, 94 S. Ct. 2714, 41 L. Ed. 2d 70 (1974)* said:

> "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press."

308, 319-20, 94 S. Ct. 1105, 1112, 39 L. Ed. 2d 347, 355-56 (1974), the Court held that refusal to allow defendant to cross-examine a key prosecution witness who had been adjudicated a juvenile delinquent denied the defendant his Sixth Amendment right to confront witnesses, notwithstanding a state policy protecting anonymity of juvenile offenders. The Court said:

> "We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In Re Gault, 387 U.S. 1, 25, 87 S. Ct. 1428, 1442, 18 L. Ed. 2d 527 (1967).*
>
> * * *
>
> "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of this witnesses . . ."

In *Davis,* the United States Supreme Court again impliedly acknowledged the right of the State of Oklahoma to seek to preserve the anonymity of a juvenile offender while recognizing the goal of protecting a juvenile offender from the stigma of misconduct of his youth may not be achieved in every case.

It is argued by petitioner that this case is similar to *Cox Broadcasting Corp. v. Cohn, 421 U.S. 469, 491, 95 S. Ct. 1029, 1047, 43 L. Ed. 2d 328 (1975)* which held a state may not impose sanctions on the accurate publication of the name of a rape victim obtained from public records, and that there is nothing that proscribes the press from

reporting events that transpire in the courtroom.[15] Petitioner argues that the adjudication hearing was held in open court and therefore what transpired at the hearing and the name and photograph of the juvenile may be published under the *Cox* rationale. The statute, 10 O.S. 1971 § 1111 provides juvenile proceedings shall be held in private unless *specifically* ordered to be held in public. There is no indication that the judge distinctly and expressly ordered the hearing to be public; therefore, the rationale of *Cox* is inapplicable.

Our research has revealed two cases in which the problem of the First Amendment right of the press has been directly confronted with the juvenile's right to anonymity. The case of *Government of Virgin Islands v. Brodhurst, 285 F. Supp. 831 (D. St. Croix 1968)* involved an appeal by the editor and publisher of a newspaper from the judgment of the municipal court in which he was fined for violation of a statute which prohibited, without court authorization, publication of the names of children who were under the jurisdiction of the court. On appeal, it was determined that a limitation may be placed on the exercise of the freedom of the press when it conflicts with maintenance of absolute fairness in the judicial process, and that the statute prohibiting publication in a newspaper of

---

15 In *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975),* the Court said:

> "The commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecution, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."

the name of the juvenile offender without permission of the court does not abridge the freedom of the press. The court concluded the balance of advantages accruing to the juvenile far outweighed the advantages to be gained by permitting the unrestricted publication of names. *Gault* was cited for the policy of juvenile law which is to "hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."

In the second case, *Ithaca Journal News, Inc. v. City Court of Ithaca, 58 Misc. 2d 73, 294 N.Y.S.2d 558 (1968)* had held freedom of the press was not an unrestricted right to publish any and all news regardless of its source or its effects, and that the freedom of the press must be balanced against the rights of a juvenile. The New York Supreme Court issued a writ of prohibition to the city court from continuing in the contempt proceeding. The case was resolved by the Court holding that the press could not be restrained from publishing the identity of youths charged with a crime when their identity had been obtained prior to the sealing of the formal written information.

Although the Oklahoma statutes are not as explicit as the Virgin Islands, in construing a juvenile code the statute should be given a liberal effect and a practical construction to avoid nullification of its purpose.[16] We believe the statute is sufficiently broad to permit the court to enjoin the publication of the name and photograph of the juvenile offender.

The importance of the press' and ultimately the community's right to publish the name of juvenile offenders must be balanced against the state's interest in protecting

---

16 See Note 8, supra.

the privacy of hearings as well as information and records in children's cases. If the press is to be afforded the freedom to gather news in this area, it will have to be shown that a child offender's right to anonymity in the present and the future is outweighed by the public's right to know. In an effort to counter-balance the First Amendment rights and the right of the juvenile to anonymity, it has been strongly recommended that newspapers should be allowed admittance to juvenile court sessions, while at the same time, being forbidden by law from disclosing the names of the participants in the hearings;[17] and that the press may be present under the provision of the statute which permits admittance of persons having a direct interest.[18]

This philosophy is compatible with that expressed in *Nebraska Press Association*, at p. 2803, the Court said:

> "The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly – a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors."

17 Geis, "Publicity and Juvenile Court Proceedings," 30 Rocky Mt. L. Rev. 101, 125-26 (1957).

New Mexico has adopted this procedure by statute. See Quinn, "The Freedom of the Press v. The Confidentiality Provisions in the New Mexico Children's Code," 4 N.M.L.R. 119 (1973).

18 "Rights and Rehabilitating in the Juvenile Courts," 67 Col. L. Rev. 281, 285-86 (1967). See also 10 O.S. 1971 § 1111, note 8, supra.

The following guidelines have been adopted in Kentucky as the result of collaboration between the press, the bench and the bar,[19] and we hereby adopt them as directives to be utilized in juvenile court proceedings in the State of Oklahoma:

> (1) News media and judges should work together with confidence in, and respect for, each other; (2) news media should be welcome to attend sessions of the juvenile court, but should not disclose names or identifying data of participants unless authorized by the court; (3) names may be used if alleged juvenile offenders are remanded for criminal prosecution in an adult criminal court; (4) responsibility for developing sound public interest and understanding of the child, the community, and the court must be shared by the judge and the news media; (5) official records may be inspected only with the judge's consent unless prohibited by statute; (6) confidential reports should not be open to inspection except at the express order of the court; (7) the judge, at his discretion, may release the name or other identifying information of a juvenile offender; (8) the Canons of Professional Ethics concerning the release of information in pending judicial proceedings should be adhered to; (9) if an alleged act of delinquency is publicized, news media may be informed of the final disposition of the case; (10) news media should bear in mind that any juvenile matter may ultimately be handled as a

19 "Guidelines on the Reporting of Juvenile Court Proceedings," 35 Ky. St. B. J. 72 (1971).

criminal case; (11) news media should recognize its responsibility to report events in a general manner without mentioning names and addresses where some matters are of sufficient public interest and could serve as a deterrent upon others."

When particular conduct is regulated in the public interest, and the regulation results in an indirect, conditional, partial, abridgment of speech, the duty of this Court is to determine which of the two conflicting interests demands the greater protection under the particular circumstances presented. In essence, the problem is one of balancing the probable effects of the statute upon the right of freedom of the press against the legislative determination that a juvenile offender has the right to anonymity in order to achieve possible rehabilitation. We have carefully considered the advantages accruing to juveniles by shielding them from publicity, and those to be gained by permitted uncontrolled publication of their names and photographs, and have concluded that the restraint on the press was valid in the interest of the possible rehabilitation of the youthful offender and his subsequent integration into society.

ORIGINAL JURISDICTION GRANTED. WRITS OF PROHIBITION AND MANDAMUS DENIED.

ALL JUSTICES CONCUR.

APPENDIX C

* * *

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

THE OKLAHOMA PUBLISHING COMPANY, a corporation, Petitioner,	)	FILED Nov. 19, 1976 * * *
vs.	)	**No. 50,052**
THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA, and THE HONORABLE CHARLES E. HALLEY, Acting Associate District Judge thereof, Respondents.	)	

DENIAL OF PETITIONER'S APPLICATION FOR STAY ORDER

Petitioner by application filed November 10, 1976 seeks a stay of the decision of this Court entered October 19, 1976.

In the interest of orderly administration of justice the application for stay order is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 19th DAY OF NOVEMBER, 1976.

/s/ Ben Williams
Chief Justice

WEDNESDAY, NOVEMBER 24, 1976

ORDER IN PENDING CASE

No. A-423 OKLAHOMA PUBLISHING CO. V. DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, OKLAHOMA, ET AL

This is a renewed application for partial stay of a pretrial order of the District Court of Oklahoma County, Oklahoma, pending filing and disposition of a petition for certiorari. The order enjoined law enforcement officials and other public employees, as well as prosecution and defense counsel "from disclosing any information or making any comment concerning" a delinquency proceeding then pending in that court against a juvenile. The order also restrained all members of the news media from "publishing, broadcasting or disseminating, in any manner, the name or picture of said minor child in connection with this pending case." On application for prohibition and mandamus challenging the restraint on the press, the Oklahoma Supreme Court sustained the order. The application for stay here filed by Oklahoma Publishing Company also challenges only the injunction against publishing the name and picture of the minor. It does not challenge the restraint on counsel or public employees; nor does it challenge the Oklahoma statute requiring juvenile proceedings to be held in

private unless specifically ordered by the judge to be open to the public.

It appearing that the name and picture of the minor involved in this case were made available to the public as a result of a hearing held at the outset of this case which was in fact open to the press, the application for stay of the order enjoining publication of the name or picture of the minor, presented to Mr. Justice White and by him referred to the Court, is granted pending the timely filing and disposition of a petition for certiorari unless earlier terminated by further order of the Court. *Nebraska Press Ass'n. v. Stuart,* No. 75-817, decided June 30, 1976, slip opinion p. 27; *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491, 495, (1975).

Mr. Justice Brennan, while not subscribing to this order, would also grant the stay.

APPENDIX D

CHILDREN

* * *

§ 1101. Definitions. – When used in this act, unless the context otherwise requires:

(a) The term "delinquent child" means (1) any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years, who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under this act; or (2) a child who has habitually violated traffic laws or ordinances.

(b) The term "child in need of supervision" means any person under the age of eighteen (18) years who is habitually truant from school, or who is beyond the control of his parents, guardian or other custodian, or who habitually deports himself so as to injure or endanger the health or morals of himself or others.

(c) The term "dependent or neglected child" means any person under the age of eighteen (18) years who is for any reason destitute, homeless or abandoned; or who is dependent upon the public for support; or who has not the proper parental care or guardianship; or whose home, by reason of neglect, cruelty, or depravity on the part of his parents, guardian or other person in whose care it may be, is an unfit place for such child; or who is in need of special care

and treatment because of his physical or mental condition, and his parents, guardian or legal custodian is unable to provide it; or whose parent or legal custodian for good cause desires to be relieved of his custody; or who is without necessary care or support through no fault of his parents, guardian or custodian. Provided, however, no child who, in good faith, is being provided with treatment and care by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a dependent or neglected child under any provision of this act.

(d) The term "Department" means the Department of Public Welfare of the State of Oklahoma.

(e) The term "adjudicatory hearing" means a hearing to determine whether the allegations of a petition under Section 1103 of this Title are supported by the evidence and whether a child should be adjudged to be a ward of the court.

(f) The term "dispositional hearing" means a hearing to determine what order of disposition should be made with respect to a child adjudged to be a ward of the court.

* * *

§ 1102. Jurisdiction of District Court–Transfer of proceedings.– The District Court shall have jurisdiction of any delinquent child, child in need of supervision, or dependent and neglected child,

who is found within the county; and of the parent, guardian or legal custodian of the child, regardless of where the parent, guardian or legal custodian is found. When jurisdiction shall have been obtained over any child, it may be retained until the child becomes twenty-one (21) years of age if a male, and may be retained until the child becomes eighteen (18) years of age if a female. For the convenience of the parties and in the interest of justice, a proceeding under this Act may be transferred to the District Court in any other county. Laws 1968, c. 282, § 102. Eff. Jan. 13, 1969.

* * *

§ 1104. Summons – Contents – Taking of child into custody. – (a) After a petition shall have been filed and after such further investigation as the court may direct, unless the parties hereinafter named shall voluntarily appear, the court shall issue a summons reciting briefly the substance of the petition and requiring the person or persons who have the custody or control of the child to appear personally and bring the child before the court at a time and place stated. The summons shall state, with particularity, the facts which bring the child within the purview of this Act, and the relief requested, and shall set forth the right of the child, parents, and other interested parties to have an attorney present at the hearing on the petition. If the person so summoned shall be other than a parent or guardian of the child, a copy of the summons shall be served on the parent or guardian,

or both, as hereinafter provided. If the parents of the child are not living together, a copy of the summons shall be served on each parent. Summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.

(b) If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may order, by endorsement upon the summons, that the officer serving the same shall at once take the child into custody. Laws 1968, c. 282, § 104. Eff. Jan. 13, 1969.

§ 1105. Service of summons – Time of hearing. – Service of summons shall be made personally by the delivery of a copy thereof to the person summoned, provided, however, that if the person to be summoned resides out of the county, the judge may order service by certifified mail to such person's last-known address, requesting a return receipt from the addressee only. Where the address of the person to be summoned is not known, or if the mailed summons is returned, the court may order that notice of the hearing be published once in a newspaper of general circulation in the county. The court may not hold the hearing until at least forty-eight (48) hours after the receipt of the notice, except with the consent of the parent; provided, however, that the court may not hold the hearing until at least five (5) days after the receipt of the notice, if the parent is not served within the State, except with the consent of the parent, or if notice is published,

until at least ten (10) days after the date of publication; provided, further, that nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare. Laws 1968, c. 282, § 105. Eff. Jan. 13, 1969.

* * *

§ 1107. Release of child to custody of parent or guardian – Confinement of child. – * * *

(b) Nothing in this act shall be construed as forbidding any peace officer or employee of the court from immediately taking into custody any child who is found violating any law or ordinance, or whose surroundings are such as to endanger his welfare. In every such case the officer taking the child into custody shall immediately report the fact to the court, and the case shall then be proceeded with as provided in this act.

* * *

§ 1110. Jury trial. In hearings to determine whether a child is within the purview of this Act, the child informed against, or any person interested in such child, shall have the right to demand a trial by jury, which shall be granted as in other cases, unless waived, or the judge on his own motion may call a jury to try any such case. Such jury shall consist of six (6) persons. Laws 1968, c. 282, § 110. Eff. Jan. 13, 1969.

§ 1111. Conduct of hearings. – All cases of children shall be heard separately from the trial

cases against adults. The hearings shall be conducted in an informal manner, according to the rules of evidence, and may be adjourned from time to time. The hearings shall be private unless specifically ordered by the judge to be conducted in public, but persons having a direct interest in the case shall be admitted. Stenographic notes or other transcript of the hearings shall be kept as in other cases, but they shall not be open to public inspection except by order of the court. A decision determining a child to come within the purview of this Act must be based on sworn testimony and the child must have the opportunity for cross-examination. Laws 1968, c. 282, § 111. Eff. Jan. 13, 1969.

§ 1112. Children charged with violating State statute or municipal ordinance – Juvenile proceedings. – (a) Except as hereinafter provided, a child who is charged with having violated any State statute or municipal ordinance shall not be tried in a criminal action, but in a juvenile proceeding in accordance with this Act. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in

this Act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the District Court or by police courts or municipal courts in cases involving children wherein the child is charged with the violation of a State or municipal traffic law or ordinance.

(b) If a child is charged with delinquency as a result of an offense which would be a crime if committed by an adult, the court, after full investigation and a preliminary hearing, may in its discretion continue the juvenile proceeding, or it may certify such child capable of knowing right from wrong, and to be held accountable for his acts, for proper criminal proceedings to any other division of the court which would have trial jurisdiction of such offense if committed by an adult.

(c) Prior to the entry of an order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances. Laws 1968, c. 282, § 112. Eff. Jan. 13, 1969.

* * *

§ 1115. Dispositional hearings – Additional reports or evidence. – (a) After making an order of adjudication, the court shall hold a dispositional hearing, at which all evidence helpful in determining the proper disposition best serving the interest of the child and the public, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of the adjudicatory hearing.

(b) Before making an order of disposition, the court shall advise the District Attorney, the parents, guardian, custodian or responsible relative, or their counsel, of the factual contents and the conclusion of reports prepared for the use of the court and considered by it, and afford fair opportunity, if requested, to controvert them.

(c) On its own motion or that of the District Attorney, or of the parent, guardian, custodian, responsible relative or counsel, the court may adjourn the hearing for a reasonable period to receive reports or other evidence and, in such event, shall make an appropriate order for detention of the child, or his release from detention subject to supervision by the court, during the period of the continuance. In scheduling investigations and hearings, the court shall give priority to proceedings in which a child is in detention, or has otherwise been removed from his home, before an order of disposition has been made. Laws 1968, c. 282, § 115. Eff. Jan. 13, 1969.

§ 1116. Disposition orders permissible. – (a) The following kinds of orders of disposition may be made in respect to wards of the court:

(1) The court may place the child on probation or under supervision in his own home, or in the custody of a suitable person elsewhere, upon such conditions as the court shall determine. The court may require the parent or other person to give security by bond, with surety or sureties approved by the court, for compliance with such order.

If it is consistent with the welfare of the child, the child shall be placed with his parent or legal guardian, but if it appears to the court that the conduct of such parent or guardian has contributed to such delinquency, or need of supervision, or dependency or neglect, the court may issue a written order specifying conduct to be followed by such parent or guardian with respect to such child. The conduct specified shall be such as would reasonably prevent the child from becoming in need of supervision, or becoming dependent or neglected, as defined by this Act. Such order shall remain in effect for a period of not more than one (1) year to be specified by the court, and the order may be extended or renewed by the court.

(2) The court may commit the child to the custody of a private institution or agency, including any institution established and operated by the county, authorized to care for children or to place them in family homes. In committing a child to a private institution or agency the court shall, whenever practicable, select one that is licensed by the Department (or other State Department supervising or licensing private institutions and agencies); or if such institution or agency is in another state, by the analogous department of that state. Whenever the court shall commit a child to any institution or agency, it shall transmit with the order of commitment a summary of its information concerning the child, and such institution or agency shall give to the court such information concerning the child as the court may at any time require.

(3) The court may commit the child to the custody of the Department; provided, any order adjudicating a child to be delinquent and committing the child to the Department shall be for an indeterminate period of time.

(4) The court may dismiss the petition or otherwise terminate its jurisdiction at any time for good cause shown.

(b) The court may not terminate the rights of a parent who has not been notified that the parental rights might be terminated. If the court terminates the rights of a parent and commits the child to an individual or agency, the court may may invest in such individual or agency authority to consent to the adoption of the child. Laws 1968, c. 282, § 116. Eff. Jan. 13, 1969.

* * *

§1118. Modification of decrees or orders. – Any decree or order made under the provisions of this Act may be modified by the court at any time; provided, however, that an order terminating parental rights, and an order committing a child adjudicated to be delinquent to the Department, may not be modified. Laws 1968, c. 282, § 118. Eff. Jan. 13, 1969.

* * *

§1122. Penalties. – A willful violation of any provision of an order of the court issued under the provisions of this Act shall constitute indirect contempt of court and shall be punishable as such. Punishment for any such act of contempt shall not

exceed a fine of Three Hundred Dollars ($300.00), or imprisonment in the county jail for not more than thirty (30) days, or both such fine and imprisonment. Laws 1968, c. 282, § 122. Eff. Jan. 13, 1969.

* * *

§ 1125. Records. – The court shall make and keep records of all cases brought before it. Such records shall be open to public inspection only by order of the court to persons having a legitimate interest therein, except that all records of proceedings in adoption cases and all papers and books relating thereto shall remain confidential as provided by law. The court shall devise and cause to be printed such forms for social and legal records and such other papers as may be required. Laws 1968, c. 282, § 125. Eff. Jan. 13, 1969.

* * *

§ 1127. Disposition or evidence not lawful in other causes or proceedings – Fingerprinting – Civil or criminal disability. – (a) A disposition of any child under this Act, or any evidence given in such cause, shall not in any civil, criminal or other cause or proceeding in any court be lawful or proper evidence against the child for any purpose whatever, except in subsequent cases against the same child under this Act. Nothing in this Act shall be construed to prevent peace officers from fingerprinting a child where there is a reasonable or probable cause to believe a crime has been committed by the child; and any child may be fingerprinted upon order of the

District Court. The records of law enforcement officers concerning juveniles shall be maintained separate from records of arrests, and shall not be open to public inspection, or by their contents disclosed to the public, except by order of the court or when criminal proceedings have been instituted.

(b) No adjudication by the court upon the status of a child shall operate to impose any of the civil disabilities ordinarily resulting from conviction, nor shall a child be deemed a criminal by reason of such adjudication, nor shall any adjudication in a juvenile proceeding be deemed a conviction, nor shall a child be charged with crime or convicted in any court, except as provided in this Act. Laws 1968, c. 282, § 127. Eff. Jan. 13, 1969.

* * *

§ 1129. Liberal construction of Act. – This Act shall be liberally construed, to the end that its purpose may be carried out, to wit: That the care and custody and discipline of the child shall approximate, as nearly as may be, that which should be given by its parents, and that, as far as practicable, any delinquent child shall not be treated as a criminal. Laws 1968, c. 282, § 129. Eff. Jan. 13, 1969.

* * *

CHAPTER 51. – DELINQUENT, DEPENDENT AND NEGLECTED CHILDREN

* * *

ARTICLE I. DEPENDENT AND DELINQUENT CHILDREN

* * *

§ 1101. Definitions. – When used in this act, unless the context otherwise requires:

(a) The term "child" means any person under the age of eighteen (18) years.

(b) The term "delinquent child" means (1) a child who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under this act; or (2) a child who has habitually violated traffic laws or ordinances.

(c) The term "child in need of supervision" means a child who is habitually truant from school, or who is beyond the control of his parents, guardian or other custodian, or who habitually deports himself so as to injure or endanger the health or morals of himself or others.

(d) The term "dependent or neglected child" means a child who is for any reason destitute, homeless or abandoned; or who is dependent upon the public for support; or who has not the proper parental care or guardianship; or whose home, by reason of neglect, cruelty, or depravity on the part of his parents, guardian or other person in whose care it may be, is an unfit place for such child; or who is in need of special care and treatment because of his physical or mental condition, and his parents, guardian or legal custodian is unable to provide it; or whose parent or legal custodian for good cause desires to be relieved of his custody; or who is without necessary care or support through no fault of his parents, guardian or custodian. Provided, however, no child who, in good faith, is being provided with treatment and care by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a dependent or neglected child under any provision of this act.

(e) The term "Department" means the Department of Public Welfare of the State of Oklahoma.

(f) The term "adjudicatory hearing" means a hearing to determine whether the allegations of a petition under Section 1103 of this Title are supported by the evidence and whether a child should be adjudged to be a ward of the court.

(g) The term "dispositional hearing" means a hearing to determine what order of disposition should be made with respect to a child adjudged to be a ward of the court.

Amended by Laws 1972, c. 122, § 1, emerg. eff. April 4, 1972.

* * *

§ 1102. Jurisdiction of District Court – Transfer of proceedings. – The district court shall have jurisdiction of any delinquent child, child in need of supervision, or dependent and neglected child, who is found within the county; and of the parent, guardian or legal custodian of the child, regardless of where the parent, guardian or legal custodian is found. When jurisdiction shall have been obtained over any child, it may be retained until the child becomes twenty-one (21) years of age. For the convenience of the parties and in the interest of justice, a proceeding under this act may be transferred to the district court in any county.

Amended by Laws 1972, c. 122, § 3, emerg. eff. April 4, 1972.

* * *

B. Nothing in this act shall be construed as forbidding any peace officer or employee of the court from immediately taking into custody any child who is found violating any law or ordinance, or whose surroundings are such as to endanger his welfare. In every such case the officer taking the child into custody shall immediately report the fact of his detention to a judge of the district court in the county in which the child was taken into custody. If no judge be available locally, then the detention shall be reported immediately to the presiding judge of the judicial administrative district; but if the latter cannot be reached, then to any judge regularly serving within the judicial administrative district, and the case shall then be proceeded with as provided in this act.

* * *

Amended by Laws 1973, c. 27, § 1, emerg. eff. April 18, 1973; Laws 1976, c. 102, § 1, emerg. eff. May 12, 1976.

§ 1111. Conduct of hearings. – All cases of children shall be heard separately from the trial of cases against adults. The adjudicative hearings shall be conducted according to the rules of evidence, and may be adjourned from time to time. The hearings shall be private unless specifically ordered by the judge to be conducted in public, but persons having a direct interest in the case shall be admitted. Stenographic notes or other transcript of the hearings shall be kept as in other cases, but they shall not be open to inspection except by order of the court. The child may remain silent as a matter of right during said hearing, and before he is interrogated, he shall be so advised. A decision determining a child to come within the purview of this Chapter must be based on sworn testimony and the child must have the opportunity for cross-examination unless the facts are stipulated. Where a child is alleged to be delinquent and the facts are stipulated, the judge must ascertain from the child if he agrees with the stipulation and if he understands the consequences of stipulating the facts.

Amended by Laws 1975, c. 252, § 1, emerg. eff. June 2, 1975.

* * *

§ 1112. Children charged with violating state statute or municipal ordinance – Proceedings – Bail. (a) Except as hereinafter provided, a child who is charged with having violated any state statute or municipal ordinance shall not be tried in a criminal action, but in a juvenile proceeding in accordance with this act. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the district court or municipal court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the district court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in this act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the district court or by municipal courts in cases involving children wherein the child is charged with the violation of a state or municipal traffic law or ordinance.

(b) If a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court shall consider the following guidelines:

1. The seriousness of the alleged offense to the community;

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

3. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;

4. Whether there is prosecutive merit to the complaint;

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults;

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;

7. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, other periods of probation or prior commitments to juvenile institutions; and

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to be guilty of the alleged offense, by the use of procedures and facilities currently available to the juvenile court;

and after full investigation and a preliminary hearing, may in its discretion continue the ju-

venile proceeding, or it may certify such child capable of knowing right from wrong, and to be held accountable for his acts, for proper criminal proceedings to any other division of the court which would have trial jurisdiction of such offense if committed by an adult.

(c) Prior to the entry of an order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances.

(d) A juvenile sixteen (16) years of age or over may be charged and prosecuted in any municipal court for violating a city ordinance if the offense does not constitute a crime under case law, and, further provided, that the maximum penalty which may be imposed shall not be in excess of Twenty Dollars ($20.00), and further provided, that the present laws relative to incarceration of juveniles shall be in no way impaired or altered by this act, nor shall this act alter present laws relative to prosecution of juveniles for traffic violations.

Amended by Laws 1973, c. 227, § 1, emerg. eff. May 23, 1972; Laws 1974, c. 35, § 1; Laws 1974, c. (?), § 2, emerg. eff. May 29, 1974.

* * *

§ 1506. Destruction of juvenile records in certain cases. – Whenever any person who as a minor has been adjudged to be a delinquent child, or a child in need of supervision, by the district court or the now defunct juvenile, children's or county court and is reformed and has been of

good behavior since reaching maturity, the court may upon expiration of five (5) years after said person attains majority upon its own motion or upon the petition of the probation officer or probation counselor, or said person, either with or without a formal hearing as the court determines, ascertain whether said delinquent, or a child in need of supervision, has been of good behavior since majority.

The court may order the sheriff and chief of police to produce their office files and records of such delinquent child, or a child in need of supervision, at any such hearing. If the court determines that said delinquent child, or a child in need of supervision, has been of good behavior since majority, he may immediately find and adjudge said child to be reformed, and shall order the clerk of the court to destroy or obliterate the entire file and record of the case, including docket sheets, index entries, court records, summons, warrants, or any other papers or records in the clerk's office or which have been produced by the sheriff or the chief of police in which said case or the name of the child is mentioned.

The court may, however, in its discretion, continue the matter for a period not to exceed one (1) additional year before denying or granting said order of obliteration.

Amended by Laws 1973, c. 7, § 1.

* * *

Supreme Court, U. S.
FILED
JAN 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-867

THE OKLAHOMA PUBLISHING COMPANY, a Corporation,
Petitioner,
v.
THE DISTRICT COURT OF OKLAHOMA COUNTY, and THE HONORABLE CHARLES E. HALLEY, Acting Associate District Judge Thereof,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Oklahoma

BRIEF IN OPPOSITION

LARRY SPEARS
BAY, HAMILTON, LEES & SPEARS
103 Investors Capital Building
217 North Harvey
Oklahoma City, Oklahoma 73102
405/235-5605

DAVID C. HOWARD
NATIONAL JUVENILE LAW CENTER
3701 Lindell Boulevard
St. Louis, Missouri 63108
314/533-8868

Counsel for Respondents

Of Counsel
PATRICIA CONNELL
ADRIENNE VOLENIK
NATIONAL JUVENILE LAW CENTER

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	2
Reasons Why the Writ Should Be Denied	4
I. The Oklahoma Decision Was Correct in Determining the State's Policy Interest in Peserving the Treatment and Rehabilitation Rights of a Juvenile Charged With Delinquency to Be Paramount to Petitioner's First Amendment Right to Publish the Identity of the Juvenile	4
II. The Oklahoma Supreme Court Acted Properly in Considering Petitioner's Appearance a General Appearance for Defect of Service Purposes	18
Conclusion	21
Certificate of Service	21

Table of Cases

Cox Broadcasting Corp. v. Cohn, 421 U.S. 469 (1975) . . 4, 6, 8

Daniel v. Daniel, 348 P.2d 185 (Okla. 1959) 18

Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968) 15

Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) 13, 15

In re Gault, 387 U.S. 1, 15-16 (1967) 12, 16

In re Wilson, 438 Pa. 425, 429, 264 A.2d 614, 618 (Pa. 1970) 14

Kent v. United States, 383 U.S. 541 (1966) 12

Lollis v. New York State Department of Social Services, 328 F. Supp. 1115 (S.D. N.Y. 1971) 16

Martarella v. Kelley, 349 F. Supp. 575 (S.D. N.Y. 1972) 14, 15

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 13

Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974) 11

Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974), rev'd and remanded, 535 F.2d 864 (5th Cir. 1976) 14, 15

Nebraska Press Ass'n v. Stuart, — U.S. —, 96 S. Ct. 2791, 2806 n.9 (1976) 4, 9, 19

Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973), aff'd, 491 F.2d 352 (7th Cir. 1974) 14, 15, 16

New York Times Co. v. United States, 403 U.S. 713 (1971) 4, 8

Porter v. Oklahoma Bacone College Trust, 346 P.2d 335 (Okla. 1959), cert. denied, 362 U.S. 927, rehearing denied 362 U.S. 984 (1960) 18

United States v. Dickinson, 465 F.2d 496, 509 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973), aff'd. on remand, 476 F.2d 373 (5th Cir. 1973) 19

United States ex rel. Sero v. Preiser, 506 F.2d 1115 (2nd Cir. 1974), cert. denied, 421 U.S. 921 (1975) 14

United States v. Painters Local Union No. 481, 79 F.Supp. 516 (D.C. Conn. 1948) 11

Winters v. People of the State of New York, 333 U.S. 507 (1948) 21

Statutes Cited

Alaska Stat. § 47.10.090 (Supp. 1975) 18

Colo. Rev. Stat. Ann. (Cum. Supp. 1975) 18

Ga. Code Ann. § 24A-3503(g) (1976) 18

Iowa Code Ann. § 232.54 (1969) 17

Miss. Code Ann. § 43-21-19 (1972) 18

Mont. Rev. Codes Ann. § 10-1241 (Supp. 1975) 18

Okla. Stat. 10 § 1111 (Supp. 1975) 5, 17

Okla. Stat. 10 § 1125 (Supp. 1975) 4

Okla. Stat. 10 § 1127 (Supp. 1975) 4, 16

Okla. Stat. 10 § 1129 (Supp. 1975) 8, 13

Miscellaneous Cited

Annot. 31 A.L.R. 2d 262 (1953) 19

Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, 1966 Wash. U.L.Q. 147, 168-174 17

Guidelines on the Reporting of Juvenile Court Proceedings, 35 Ky. St. B. J. 72 (1971) 10

United States Constitution, First Amendment . . 2, 4, 6, 7, 11, 19

United States Constitution, Fourteenth Amendment 2, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-867

THE OKLAHOMA PUBLISHING COMPANY, a Corporation,
Petitioner,

v.

THE DISTRICT COURT OF OKLAHOMA COUNTY, and THE HONORABLE CHARLES E. HALLEY, Acting Associate District Judge Thereof,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Oklahoma

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Supreme Court of Oklahoma erred in upholding respondent trial judge's order prohibiting petitioner news association from disseminating illegally granted or acquired identifying information about a juvenile charged with delinquent conduct in order to protect the state's policy interest and the child's individual right to treatment and rehabilitation?

2. Whether the Oklahoma Supreme Court's decision holding the application to vacate the pretrial order on substantive

and procedural grounds a waiver of the alleged defect of personal service was a denial of due process under the First and Fourteenth Amendments?

STATEMENT OF THE CASE

While respondents[1] agree in large part with the facts as set forth in the Petition for Certiorari, there are additional, disputed facts which respondent feels are material to this Court's consideration of the Petition.

1. The initial detention hearing of the juvenile in this case was held before Special Judge Michael Tullius on July 28, 1976. On that day, prior to the hearing, a reporter stopped Judge Halley in the Courthouse hallway and asked him where L.B.'s hearing was to be held. When Judge Halley replied he did not know who the person was, the reporter informed him that L.B. was the child charged with shooting the railroad switchman. Furthermore, at the request of a photographer, a court clerk asked Judge Tullius if the child's picture could be taken; the judge said no.

2. On August 5, 1976, petitioner's newspaper, The Daily Oklahoman, carried a story of the Oklahoma County District Attorney's intent to challenge the restrictive order issued on August 3, 1976. This article setting forth the date and time of the scheduled hearing evidenced petitioner's prior knowledge of the pretrial order and the upcoming opportunity to contest its provisions.

---

[1] Respondents in this case are the District Court of Oklahoma County and the Honorable Charles E. Halley, Acting Associate District Judge. The respondents have been represented throughout all appellate proceedings by the attorney for the juvenile, Larry Spears, Esq. Mr. Spears will be joined in his appearance before the U.S. Supreme Court by David C. Howard, Attorney from the National Juvenile Law Center.

3. The hearing was held as scheduled on August 5 with several of petitior r's employees present. The District Attorney, Andrew Coats, asked that the Pretrial Order be modified "insofar as it attempts to place restrictions upon the District Attorney, his assistants and employees, defense counsel, or the media, from disclosing legitimate information in regard to the proceedings. . . ." (District Attorney's Motion to Modify). Respondent allowed the district attorney to argue the case both on behalf of the media and the prosecutor's office. At the close of the hearing the respondent judge entered the Modification of Pretrial Order found at Appendix A-2 of Petitioner's Writ. This Order lifted the restrictions placed on defense counsel and the district attorney's office while continuing the ban on publication in the news media of the name or photograph of the child connected with the case.

4. On August 10, 1976, petitioner filed a Special Appearance and Application to vacate the Pretrial Order on grounds that it denied petitioner procedural due process and substantive First Amendment rights. On August 16, 1976, respondent conducted a hearing on petitioner's request at which petitioner fully propounded arguments in support of its application. Following arguments of counsel, including the juvenile defense attorney's offer of proof and oral stipulation by petitioner's counsel regarding the submission of expert testimony concerning the pernicious effects of publicity upon the subject child and the intention of the juvenile's parents to rear the child in Oklahoma County (a large urban area), the respondent court took judicial notice of the adverse impact of said identifying publicity upon the juvenile's peers and its circumvention of state rehabilitative goals. (Transcript of hearing pp. 94-96).

5. On January 12, 1977, respondent held the juvenile's dispositional hearing committing the child to the custody of his natural father. No further action is scheduled or anticipated in this minor's case.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Oklahoma Decision Was Correct in Determining the State's Policy Interest in Preserving the Treatment and Rehabilitation Rights of a Juvenile Charged With Delinquency to Be Paramount to Petitioner's First Amendment Right to Publish the Identity of the Juvenile.

Petitioners contend that the Court should exercise its certiorari jurisdiction as to the decision of the Supreme Court of Oklahoma because it "carves an unprecedented exception to the history of the First Amendment and the teachings of this Court, that the imposition of a prior restraint upon information *openly obtained* concerning judicial proceedings is presumptively invalid," (emphasis added) citing *Nebraska Press Ass'n v. Stuart*, — U.S. —, 96 S. Ct. 2791 (1976), *Cox Broadcasting Corp. v. Cohn*, 421 U.S. 469 (1975), and *New York Times Co. v. United States*, 403 U.S. 713 (1971). However, since the manner in which petitioner posits its contentions belies the suspicious means by which reporters initially gained access to the child's identity, the factual underpinning necessary to support the design of petitioner's argument is fatally defective. If the juvenile court[2] and police[3] records were not absolutely protected by statute,

[2] OKLA. STAT. 10 §1125 (Supp. 1975) provides:

> The court shall make and keep records of all cases brought before it. Such records shall be open to public inspection only by order of the court to persons having a legitimate interest therein, except that all records of proceedings in adoption cases and all papers and books relating thereto shall remain confidential as provided by law. The court shall devise and cause to be printed such forms for social and legal records and such other papers as may be required.

[3] OKLA. STAT. 10 §1127 (Supp. 1975) requires:

> (a) Disposition or evidence concerning a child under this act is not proper evidence against a child in any civil or criminal proceeding or other cause in any Court for any purpose whatsoever.
>
> (b) That all police records shall be confidential and not open to public inspection.

if the juvenile court proceedings were not required to be held privately,[4] and if reporters had initially been granted or gained access to the child's identity other than by modes violative of explicit state law, petitioner's argument would have merit under the *Cox* rationale. But despite petitioner's repeated assertions that the information was "publicly available and lawfully obtained"[5] (*e.g.*, Petition at 12), this was simply not the case—the reporter's query to Judge Halley about where "L.B.'s hearing was to be held, *before* the initial detention hearing on July 28, reveals that at least one reporter had already obtained the child's name, presumably from police contacts and not from the so-called "open" hearing. It should be obvious that police records regarding the apprehension of juveniles are confidential whenever or however they are compiled and do not lose their private status if inadvertently or intentionally relinquished, arrogated or wrongfully disseminated.

In his ruling from the bench following petitioner and defense counsel's procedural and substantive arguments on August 16, respondent judge clearly negated petitioner's factual proposition regarding the *de facto*, unobstructed nature of the local juvenile court proceedings:

> When the Court entered its pre-trial order, [of August 3] it was of the opinion that those statutes which make Ju-

[4] OKLA. STAT. 10 §1111 (Supp. 1975) regarding the conduct of hearings provides:

> All cases of children shall be heard separately from the trial cases against adults. The hearings shall be conducted in an informal manner, according to the rules of evidence, and may be adjourned from time to time. The hearings shall be private unless specifically ordered by the judge to be conducted in public, but persons having a direct interest in the case shall be admitted. Stenographic notes or other transcript of the hearings shall be kept as in other cases, but they shall not be open to public inspection except by order of the court . . .

[5] Petitioner reiterates this assertion in its petition no less than sixteen times as if repetition of what may be a half-truth will somehow make it whole.

> venile Court files confidential, the statute that makes police files confidential where they concern juveniles and the statutes which provide for closed hearings in juvenile cases would be totally ineffective if the closed hearing and the confidentiality of the files were open for public inspection or for the inspection of the news media; that those statutes would be totally abortive if the news media could find through confidential sources or otherwise the name of a juvenile and, thereafter, without his permission or the Court's permission, take his photograph.

Transcript of hearing, pp. 95-6.

In an opinion by Mr. Justice White, the Court in *Cox Broadcasting Corp. v. Cohn*, 421 U.S. 469 (1975), acknowledged that "there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity." *Id.* at 487 (footnote omitted). The issue in *Cox* did not, as here, involve the appropriation of one's name or photograph by a physical or other tangible intrusion into a private area. *Id.* at 489. The Court, at the outset, recognized the serious confrontation between the common law tort for invasion of privacy and the First Amendment freedom of the press and absolutely declined to address the broader question of whether the press can ever be criminally or civilly liable for publishing information that is neither false nor misleading, but accurate however damaging it may be. *Id.* at 490. Instead, the Court focused upon the narrower issue between the press and the right of privacy, namely, whether a state may impose sanctions on the accurate publication of the name of a rape victim obtained from *public records*—more specifically from judicial records which are maintained in connection with the public prosecution and which themselves are open to *public inspection*. *Id.* at 491. The important responsibility of the news media to fully and accurately report governmental proceedings in order to assure beneficent public scrutiny was juxtaposed on

the scales with an individual's right to maintain his protective zone of privacy in an apparent balancing test:

> Thus, even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press.

421 U.S. at 494-5. Because the information about the rape victim had been obtained from public records, the majority held that a state could not, consistently with the First and Fourteenth Amendments, impose sanctions upon or restrict the accurate publication of such information by the news media.

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform their readers about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be put into print and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. *If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.*

421 U.S. at 495-6 (emphasis added). The State of Oklahoma has unequivocally responded with explicit, statutory mandates safeguarding the confidentiality of police and court proceedings pertaining to juveniles.[6] Surely the unlawful, unwarranted or

---

[6] *See* notes 2-4, *supra*.

otherwise improper release or acquisition of confidential juvenile arrest records does not change their character so that they may thereafter be classified as "public records." Whenever or however petitioner obtained the child's name, it knew, or should have known, that it was a confidential arrest report or proceeding, relating solely to an 11-year-old juvenile, the publication of which would violate state law. Ignorance of the law has never been an excuse.

It is important to note that the Court in *Cox* declined to declare the Georgia code section unconstitutional. And contrary to petitioner's argument, *Cox* is not dispositive: the Court restricted the effect of its decision by refusing to rule on the permissibility of state policy delimiting public access to certain records, specifically including juvenile court proceedings:

> We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings.

Id. at 497 n. 26.

By construing the legislative policy in accord with the dictates of its statutory purpose clause,[7] the court below appropriately held that the Oklahoma statutes were sufficiently broad to permit the trial court, under the circumstances, to enjoin the publication of the name and photograph of the child.

In *New York Times Co. v. United States*, 403 U.S. 713 (1971), this Court denied the government's request for an in-

[7] OKLA. STAT. 10 §1129 (Supp. 1975), prescribes:

> This Act shall be liberally construed, to the end that its purpose may be carried out, to wit: That the care and custody and discipline of the child shall approximate, as nearly as may be, that which should be given by its parents, and that, as far as practicable, any delinquent child shall not be treated as a criminal.

junction proscribing publication of a previously classified study known as "The Pentagon Papers." The decision appeared to carve out a very narrow exception to the rule prohibiting prior restraints, i.e., cases involving a clear and present danger to the national security. There were important public policy considerations involved in that case concerning the public's right and need to know in order to understand and control the secrets and abuses of government. Doubtless this right to know extends to other areas of general interest which are of far less national or even local concern, but it is highly questionable whether the same considerations are applicable to the publication of the names of children.

Petitioner contends that this Court, in recognizing only a national security exception to the freedom of the press, has refused to acknowledge or consider other competing governmental interests in cases not involving national security. While noting that the presumption against the use of a "gag rule" is a difficult obstacle to surmount, the Court in *Nebraska Press Ass'n v. Stuart*, — U.S. —, 96 S.Ct. 2791 (1976), acknowledged in some instances a prior restraint might be permissible.

> Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, *with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome;* to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibits publication based on information gained from other sources, we conclude

> that the heavy burden imposed as a condition to securing a prior restraint was not met.

96 S. Ct. at 2808 (emphasis added). The order struck down by the Court prohibited reporting or commentary on a public, judicial proceeding. The pretrial order challenged herein emanated from a private hearing and merely proscribed identifying the juvenile; it did not interdict commentary on what occurred at the proceeding.

The Oklahoma Supreme Court reversed that portion of the pretrial order relating to insuring a fair trial and further narrowed the effect of the ruling so as to equitably align the competing interests by adopting the juvenile court bar-press directives of Kentucky.[8]

With the exception of the August 3, 1976 hearing, the press was allowed to attend the hearings and report everything that transpired therein, except the name and photograph of the accused child. Thus, the pretrial order as ultimately upheld by the Oklahoma Supreme Court, is fashioned narrowly enough to secure precise, statutory objectives—the reasonable protection of a juvenile suspect's identity and preservation of his opportunity for rehabilitation—without prohibiting access to or comment on the ongoing proceedings and without discouraging the circulation of ideas or concepts regarding the proceedings among the scrutinizing public. In *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Court said:

> The state may not employ means that bluntly stifle fundamental personal liberties when the end can be more narrowly achieved . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case . . . An order issued in the area of First Amendment

[8] "Guidelines on the Reporting of Juvenile Court Proceedings," 35 Ky. St. B. J. 72 (1971).

> rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.

Id. at 183-4. From this language the Court indicates that an order could be drafted with limited prior restraints—if tailored precisely to the exact needs of the competing interest.

In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the Court struck down Florida's right of reply statute which granted certain candidates equal space to answer newspaper criticisms. The Court held that governmental regulation should not take the place of editorial control and judgment. But the Court's interpretation of the meaning of the First Amendment permeates this decision and that construction allows a balancing test in a proper case. Indeed, such a test can be used and the First Amendment is subject to reasonable restrictions when necessary to safeguard public policy interests. *See, United States v. Painters Local Union No. 481*, 79 F.Supp. 516 (D.C. Conn. 1948).

The above cases illustrate the varying potency of the presumption of constitutional invalidity of a prior restraint depending upon the importance of the national or public interest involved. The presumption is ostensibly at full strength when the press seeks to enlighten the public on governmental excess or deviance. Balancing tests are more frequently employed when the issue concerns local groups or interests, and there is a strong public policy favoring the confidentiality of records, police contact and court action relating to juveniles.

The Oklahoma Supreme Court in its decision in this case balanced the child's right to anonymity against the public's right to know. They found this right to anonymity to be an integral part of the child's right to rehabilitation.

The entire basis of the separate juvenile court system from its inception at the turn of the last century was that children

should be treated with an end towards rehabilitation rather than punished as they would be in the adult criminal system. This underlying purpose of the juvenile justice system has been recognized by this Court in *Kent v. United States*, 383 U.S. 541, 554 (1966), in which the Court declared: "The objectives are to provide measures of guidance and rehabilitation for the child and protection for society." One year later this Court reiterated this stance in *In re Gault*, 387 U.S. 1, 15-16 (1967): "The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."

The rehabilitative treatment of children contemplated by juvenile court acts is intended to serve the welfare of both child and society. The child is to be protected from additional harm and to be enabled to become a functioning, healthy adult. Society's interests are protected and enhanced through the transformation of a potential criminal or potential, perpetual charge upon the public welfare rolls into a productive, useful law-abiding citizen.

It is frequently said that it is the law's policy "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." *Gault*, 387 U.S. at 25. Referring to the statutory trade off imposed upon juveniles supplanting procedural regularity with individualized treatment (see discussion *infra*), the Court, speaking through Mr. Justice Fortas, indicated approval of state confidentiality policies:

> [T]here is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide and improve provision for the confidentiality of records of police contacts and court action relating to juveniles.

Id. at 24.

The right to rehabilitation, of which the right to anonymity is an integral part, has found support in the purpose clauses of most juvenile acts. The Oklahoma juvenile code is typical of these as it provides at OKLA. STAT. 10 §1129 (Supp. 1975):[9] "[t]hat the care . . . of the child shall approximate as nearly as may be, that which should be given by its parents, and that, as far as practicable, any delinquent child shall not be treated as a criminal."

In addition to its statutory basis, and perhaps more importantly when this right is to come into conflict with the highly protected First Amendment freedoms, is the constitutional basis for the child's right to rehabilitation. Numerous federal and state courts have found that procedural and substantive due process, guaranteed by the Fourteenth Amendment, require the provision of treatment for the noncriminally committed. In *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972), the district court concluded from an analysis of this Court's decisions in *Gault* and *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), that the right to treatment for juveniles is constitutionally required by procedural due process. Since due process is applicable to juvenile court proceedings, but does not require a jury trial at delinquency adjudications, the court deduced that:

> the constitutional validity of present procedural safeguards in juvenile adjudications, which do not embrace all of the rigorous safeguards of criminal court adjudications, appears to rest on the adherence of the juvenile justice system to rehabilitative rather than penal goals.

346 F. Supp at 1364. Based on this assumption, procedural due process demands that a right to treatment for juveniles be the *quid pro quo* for the lack of complete procedural safeguards.

---

[9] *See* note 7, *supra*.

> Rehabilitation, then, is the interest which the state has defined as being the purpose of confinement of juveniles. Due process in the adjudicative stages of the juvenile justice system has been defined differently from due process in the criminal justice system because the goal of the juvenile system, rehabilitation, differs from the goals of the criminal system, which include punishment, deterrence and retribution. Thus due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization further the goal of rehabilitation.

346 F. Supp. at 1364. Other juvenile cases applying a due process right to treatment include: *Martarella v. Kelley*, 349 F. Supp. 575 (S.D. N.Y. 1972); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd and remanded*, 535 F.2d 864 (5th Cir. 1976); and *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974).

Both equal protection of the law, guaranteed by the Fourteenth Amendment, and the Eighth Amendment ban against cruel and unusual punishment have likewise been used as a basis for the provision of the treatment necessary to rehabilitation of the minor. Equal protection denials have been found in cases involving the disparity between maximum length of confinement of juveniles and that of adults who have committed the same offense. While the disparity *per se* has not yet been recognized as a deprivation of equal protection, the indeterminate juvenile disposition is said to be necessary to accomplish rehabilitation. *See, Smith v. State*, 444 S.W.2d 941, 945 (Tex. Civ. App. 1969). However, if rehabilitative treatment is not provided, confinement in excess of the maximum criminal sentence would be a violation of equal protection. *See. e.g., In re Wilson*, 438 Pa. 425, 429, 264 A.2d 614, 618 (Pa. 1970), *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2nd Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

In *Haziel v. United States*, 404 F.2d 1275 (D.C. Cir. 1968), Judge Bazelon strongly suggested that the denial of statutorily required treatment to an indigent juvenile is an equal protection violation, when an affluent juvenile can afford to secure private treatment.

> We do not find it necessary to determine the difficult question whether the statutory promise of noncriminal treatment in all but exceptional circumstances may be denied the juvenile because of the lack of adequate facilities. We will recognize the undeniable limitations upon the resources available to the Juvenile Court. On the other hand, we cannot ignore the mockery of a benevolent statute unbacked by adequate facilities. And to the extent that a juvenile with more affluent parents may avoid waiver because of the availability of private-financed treatment and rehabilitation, constitutional issues may lurk in the problem.

404 F.2d at 1280.

Certain practices and conditions in which the noncriminally committed are confined have been enjoined as violative of the Eighth Amendment. *Inmates of Boy's Training School v. Affleck*, 346 F. Supp. at 1365-67, (barren, unsanitary conditions of rooms and solitary confinement); *Martarella v. Kelley*, 349 F. Supp 575 (S.D. N.Y. 1972) (confinement of young girls in ancient maximum security institution); *Morales v. Turman*, 364 F. Supp. 166, 173-174 (E.D. Tex. 1973), 393 F. Supp. 53 (E.D. Tex. 1974), *rev'd and remanded*, 535 F.2d 864 (5th Cir. 1976), (forms of punishment: physical abuse, solitary confinement, tear gassing).

Without exposition, other courts have declared that certain practices violate the Eighth Amendment. Routine beatings of juveniles with a "fraternity paddle" and the administration of tranquilizing drugs, not as therapy, but to control excited be-

havior, was found to be cruel and unusual. *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1973), *aff'd*, 491 F.2d 352 (7th Cir. 1974). The two week long solitary confinement of a juvenile in a "strip room" was found to be cruel and unusual. *Lollis v. New York State Department of Social Services*, 328 F. Supp. 1115 (S.D. N.Y. 1971).

Thus, ample authority exists for the constitutional pretext, recognized by the Oklahoma decision, of the juvenile's right to proper treatment, i.e., protection of his anonymity so as to preserve his opportunity for rehabilitation.

As aforesaid, unlike the adult system of criminal justice, the juvenile system is treatment oriented with its primary aim rehabilitation of the child to the extent that ultimately the child may be reintegrated into society. Consistent with this purpose Oklahoma has, along with the majority of states, statutorily decreed that an adjudication of delinquency will not operate to impose the civil disabilities that ordinarily result from a criminal conviction nor will such an adjudication be deemed a conviction. OKLA. STAT. 10 § 1127 (Supp. 1975).[10] This provision illustrates the states' position that children are to be helped by their contacts with the judicial system and protected from adverse consequences that might otherwise result. It has, however, been recognized that the noble purpose of the juvenile code has, unfortunately, never been realized. *In re Gault*, 387 U.S. 1 (1967). While rehabilitation may often be affected, avoidance of disabilities is not so successful. A juvenile record may not only limit employment opportunities, it may also limit educational opportunities or the chance to enlist in one of the branches of the armed forces. Lastly, it may result in social ostracism by a community that, very naturally, fails to differentiate between crimes simply because the perpetrator of one happens to be under a certain age and the perpetrator of another,

[10] *See* note 3, *supra*.

over it. *See* Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L. Q. 147, 168-174.

In attempts to further prevent disabilities, legislatures have enacted other provisions aimed at protecting juveniles from adverse publicity as a result of their involvement with the juvenile court.

For example, nearly every state specifically requires that juvenile court records be closed to the general public. Exceptions are, of course, authorized in some of these states and in them access may almost always be obtained with the court's permission. Of the seven states that do not limit access to records, Arizona, Arkansas, Indiana, Iowa, Kentucky, Vermont, and West Virginia, only Iowa statutorily states that the legal record of the juvenile court is a public one. IOWA CODE ANN. § 232.54 (1969).

Additionally, in nearly every state limitations are placed upon attendance at juvenile hearings. Most states presumptively exclude the general public while providing for the admission with consent of the court of other persons with an interest in the case. These provisions are similar to OKLA. STAT. 10 § 1111 (Supp. 1975).[11] In only four of those jurisdictions are the media exempted from these limitations and in three of those four, Montana, Utah, and Iowa, the court may, under certain circumstances impose restrictions upon attendance. Only the Illinois statutes impose no additional conditions on media attendance.

Nineteen jurisdictions go beyond mere limitation on access to hearings and place specific restrictions on the kind of information that the news media may make public. The most common form of restriction is to prohibit the publication of identifying information such as name, picture, or address of either a child or that child's parents or guardian.

[11] *See* note 4, *supra*.

These prohibitions are rarely absolute and, almost without exception, the court has the authority to authorize publication when it deems the circumstances require. Additionally, the right to publish information may hinge upon the nature of the alleged offense as well as upon previous adjudications of delinquency, *see, e.g.*, MONT. REV. CODES ANN. § 10-1241 (Supp. 1975); ALASKA STAT. § 47.10.090 (Supp. 1975); GA. CODE ANN. § 24A-3503(g) (1976); MISS. CODE ANN. § 43-21-19 (1972).

These provisions and others like them evidence the recognition by nearly every state of the important policy interest in maintaining the anonymity of a juvenile processed by the juvenile system. The right rarely extends beyond placing a limitation upon the publication of identifying information and as in Oklahoma, usually allows the media the unbridled discretion to publish any information concerning the alleged offense itself. Normally only the name, picture and address of the juvenile and his parents are protected. *See, e.g.*, COLO. REV. STAT. ANN. (Cum. Supp. 1975). Thus, a proper balance is struck; the public's right to know what is occurring is protected at the same time the juvenile's right to anonymity is assured.

II. The Oklahoma Supreme Court Acted Properly in Considering Petitioner's Appearance a General Appearance for Defect of Service Purposes.

The Oklahoma Supreme Court in its decision correctly applied the state law which has for some time held that the filing of a motion to vacate a judgment on non-jurisdictional as well as jurisdictional grounds acts as a general appearance waiving all defects in service. *E.g., Daniel v. Daniel*, 348 P.2d 185 (Okla. 1959) and cases cited therein; *Porter v. Oklahoma Bacone College Trust*, 346 P.2d 335 (Okla. 1959), *cert. denied*, 362 U.S. 927, *rehearing denied* 362 U.S. 984 (1960). This has long been the rule in most jurisdictions of this country and is the

subject of a lengthy annotation. Annot. 31 A.L.R.2d 262 (1953).

In making its decision to enter an appearance and contest the Pretrial Order, petitioner's "Hobson's Choice" was at best illusory; petitioner was left with the choice any litigant must make —whether to enter a law suit and risk an adverse decision on the merits, or to ignore an existing order and dodge attempts at proper service. The case of *United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973), *aff'd. on remand*, 476 F.2d 373 (5th Cir. 1973), presents no special problem for petitioner as it holds that an order "issuing out of a court having subject matter and personal jurisdiction must be obeyed." This Court in *Nebraska Press Ass'n v. Stuart*, —- U.S. —, 96 S. Ct. 2791, 2806 n.9 (1976), mentioned the option available to petitioner in this case was to simply ignore the order.

Were this an action to enforce by contempt powers the August 3rd order, petitioner might properly raise the defects of notice and service existing at the time of the initial order as a defense. The present posture of this case, however, is that petitioner seeks an affirmative writ to ban the enforcement of an order issuing out of the August 16th hearing at which petitioner was heard fully on the merits. Their Application to Quash and Vacate, based as it is on substantive First Amendment claims, and their admitted receipt of the Pretrial Order is evidence of their knowledge of the facts and issues which had been presented to respondents before entering the order. Petitioner cannot now raise the procedural defects of the August 3rd hearing as a denial of due process at the August 16th hearing. Given the settled state of the law and the limited relevance of petitioner's claim it is not surprising that the Oklahoma Supreme Court dispensed with the issue in its perfunctory manner.

Petitioner next asserts that the Pretrial Order "was vague as to whom it applied." While the Order's language, "all mem-

bers of the news media" is less than clear, the next sentence setting forth upon whom service should be made would cure any defects in the earlier wording. In *Winters v. People of the State of New York*, 333 U.S. 507 (1948), this Court discussed the dangers inherent in criminal statutes which do not clearly indicate to whom they apply. This case presents none of these problems since before any penalty may be exacted, service must be accomplished as is mandated by the Order.

While petitioner apparently now attacks the substance of the order on vagueness grounds, this claim was not presented to the Oklahoma Supreme Court. Likewise the language "facts which might lead to the identity of the juvenile" is nowhere contained in any of the pretrial orders issued by respondents or which were the subject of review by the court below.

CONCLUSION

The Supreme Court of the State of Oklahoma has rendered an authoritative opinion on the issues presented by this case. For the reasons set forth herein, respondents respectfully request that the Petition for Writ of Certiorari to review that decision be denied.

Respectfully submitted,

LARRY SPEARS
BAY, HAMILTON, LEES & SPEARS
103 Investors Capital Building
217 North Harvey
Oklahoma City, Oklahoma 73102
405/235-5605

DAVID C. HOWARD
NATIONAL JUVENILE LAW CENTER
3701 Lindell Boulevard
St. Louis, Missouri 63108
314/533-8868

Counsel for Respondents

Of Counsel

PATRICIA CONNELL
ADRIENNE VOLENIK
NATIONAL JUVENILE LAW CENTER

Certificate of Service

I, David Howard, hereby certify that I have, this 23rd day of January, 1977, sent by First Class Mail, postage prepaid, a copy of the foregoing "Brief in Opposition" to the following:

Michael Minnis
Rainey, Wallace, Ross & Cooper
745 First National Center West
Oklahoma City, Oklahoma 73102

Richard M. Schmidt, Jr.
Ian D. Volner
Cohn & Marks
1920 L Street, N.W.
Washington, D. C. 20036

David Howard

Supreme Court, U. S.
FILED
JAN 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-867

THE OKLAHOMA PUBLISHING COMPANY, a corporation,
Petitioner,

v.

THE DISTRICT COURT OF OKLAHOMA COUNTY, and THE HONORABLE CHARLES E. HALLEY, Acting Associate District Judge thereof,
Respondents.

BRIEF OF AMICUS CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

ARTHUR B. HANSON
MITCHELL W. DALE
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
202/298-6161

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

15385-1-77

INDEX

	Page
PRELIMINARY STATEMENT	1
INTEREST OF AMICUS CURIAE	2
QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF CASE	5
ARGUMENT	5
Respondents' Order Constitutes an Invalid Prior Restraint Upon Freedom of the Press	5
Respondents' Pretrial Order Is Constitutionally Invalid Because the Procedures Employed in Its Issuance, and Its Overboard Scope, Result in the Patent Violation of Petitioner's Fourteenth Amendment Right of Due Process	13
CONCLUSION	17

TABLE OF CITATIONS

CASES:

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) .. 4, 6
Bridges v. California, 341 U.S. 252 (1941) 3, 8
Carroll v. Princess Anne, 393 U.S. 175 (1968) 3, 15, 16
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) .. 3, 6
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) 4, 5, 9, 10, 12
Craig v. Harney, 331 U.S. 367 (1947) 3, 4, 8
Estes v. Texas, 381 U.S. 532 (1965) 8
Freedman v. Maryland, 380 U.S. 51 (1965) 15
Grosjean v. American Press Co., 297 U.S. 233 (1936) 3, 5
Hynes v. Mayor and Council of the Borough of Oradell, 48 L.Ed.2d 243 (1976) 16
In Re Oliver, 333 U.S. 257 (1948) 5

	Page
Kingsley Books, Inc. v. Brown, 254 U.S. 436 (1957)	15
McKinney v. Alabama, — U.S. — (1976)	16
Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)	3, 13
Miller v. California, 413 U.S. 15 (1973)	3
NAACP v. Button, 371 U.S. 415 (1963)	16
Near v. Minnesota, 283 U.S. 697 (1931)	3, 4, 5, 6, 12
Nebraska Press Ass'n v. Stuart, 96 S.Ct. 2791 (1976)	3, 4, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	3
New York Times Co. v. United States, 403 U.S. 713 (1971)	3, 4, 6, 13, 17
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	6
Patterson v. Colorado, 205 U.S. 454 (1907)	3, 5
Pennekamp v. Florida, 328 U.S. 331 (1946)	8
Roth v. United States, 354 U.S. 476 (1957)	3, 6
Schenck v. United States, 249 U.S. 47 (1919)	6
Shelton v. Tucker, 364 U.S. 479 (1960)	16
Shepard v. Maxwell, 384 U.S. 333 (1966)	5, 8
Smith v. Goguen, 415 U.S. 566 (1974)	16
Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975)	3
Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016 (1972)	14, 15
Stroble v. California, 343 U.S. 181 (1952)	5
Tinker v. Des Moines School District, 393 U.S. 503 (1969)	16
United States v. Dickinson, 465 F.2d 496, *aff'd after remand*, 476 F.2d 373, *cert. denied*, 414 U.S. 979 (1973)	14
United States v. Schiavo, 504 F.2d 1 *cert. denied*, 95 S.Ct. 690 (1974)	16

OTHER AUTHORITIES:

Monaghan, *First Amendment "Due Process"* 83 Harv. L. Rev. 518 (1970)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-867

THE OKLAHOMA PUBLISHING COMPANY, a corporation,
Petitioner,

v.

THE DISTRICT COURT OF OKLAHOMA COUNTY, and THE HONORABLE CHARLES E. HALLEY, Acting Associate District Judge thereof,
Respondents.

BRIEF OF AMICUS CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submit this brief amicus curiae in support of Petitioner, the Oklahoma Publishing Company. All parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,200 newspapers representing over ninety-percent of the total daily and Sunday newspaper circulation and a portion of the weekly newspaper circulation in the United States. *The Daily Oklahoman, The Oklahoma City Times, The Sunday Oklahoman,* and fourteen other newspapers published throughout the State of Oklahoma, hold membership in ANPA.

Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers: the gathering of information for dissemination to the public. To insure the free and uncensored flow of information to the public, newspapers and their employees must be free to report happenings in their communities, particularly events taking place in the open courtroom, without censorship and "gag" orders.

It is most respectfully recalled to this Court's attention that the command of the First Amendment—that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."—has been both applied through the Fourteenth Amendment to invalidate re-

straints of freedom of the press imposed by the States, *see, e.g., Miami Herald Pub. Co.* v. *Tornillo,* 418 U.S. 241 (1974); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); and interpreted to prohibit such restraints when imposed by the courts, *see, e.g., Nebraska Press Ass'n* v. *Stuart,* 96 S.Ct. 2791 (1976); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971); *Craig* v. *Harney,* 331 U.S. 367 (1947); *Bridges* v. *California,* 314 U.S. 252 (1941).

Moreover, the protections afforded by the First Amendment are most vigorously applied to prevent previous restraints upon publication. This Court has noted: "[T]he main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments. . . ." *Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907); *see also, Near* v. *Minnesota,* 283 U.S. 697, 710-717 (1931); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 249 (1936). Accordingly, this Court has accorded greater protection against prior restraints upon speech than against subsequent punishment for illegitimate speech. *See, e.g., Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546 (1975); *Carroll* v. *Princess Anne,* 393 U.S. 175, 180-181 (1968). Only narrow exceptions to the rule against prior restraints have been approved by this Court. *See, e g., Miller* v. *California,* 413 U.S. 15 (1973); *Roth* v. *United States,* 354 U.S. 476, 481 (1957) (obscene publications); and *Near* v. *Minnesota, supra,* at 716; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942) ("fighting words").

A third category of expression—the publication of information relating to matters of military security—has been adverted to *in dictum* as speech which, although otherwise constitutionally protected, might be

suppressed before publication upon proof that disclosure would "surely result in direct, immediate and irreparable damage to our Nation or its people." *New York Times Co.* v. *United States, supra,* at 730 (Stewart, J., concurring opinion). *See also, Near* v. *Minnesota,* supra, at 716. Nevertheless, "[e]ven this third category . . . has never served as the basis for actually upholding a prior restraint against the publication of constitutionally protected materials." *Nebraska Press Ass'n* v. *Stuart, supra,* at 2818 (Brennan, J., concurring opinion).

The order barring Petitioner from republishing information lawfully obtained and already broadly disseminated to the public comes before this Court as a prior restraint, and therefore "with a heavy presumption of invalidity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1962). The information sought to be published herein was openly obtained by Petitioner in publicly held judicial proceedings. There is no indication that the enjoined publication would irreparably injure the juvenile's legal rights or his asserted right to anonymity and rehabilitation. Therefore this "presumption of invalidity," your *amicus* respectfully submits, cannot be overcome. No authority exists for the contention of the Oklahoma Supreme Court that "the interest of the possible rehabilitation of the youthful offender and his subsequent integration into society" overrides the right of the press to publish freely information lawfully obtained in open court. In fact, Respondent's contention has been expressly foreclosed by the prior decisions of this Court. *See Nebraska Press Ass'n* v. *Stuart, supra; Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1974); *Craig* v. *Harney,* 331 U.S. 367, 374 (1974).

Because it is essential to our democratic system of government that the press be unfettered in its right to report on events that transpire in open court, *see, e.g., Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966); *Cox Broadcasting Corp.* v. *Cohn, supra,* at 491-496; *Stroble* v. *California,* 343 U.S. 181 (1952); *In re Oliver,* 333 U.S. 257, 270-271 (1948); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 250 (1936); and because the order and holding of the lower court herein, if allowed to stand, would directly and adversely impact upon the membership of ANPA in the performance of their duty to insure the free and uncensored flow of information to the public, ANPA desires to briefly present to the Court, for its assistance, its views on the important issues raised in Petitioner's application before this Court.

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

We adopt the questions presented, constitutional provisions involved, and statement of the case, all as set forth in Petitioner's brief.

ARGUMENT

1. Respondents' Order Constitutes an Invalid Prior Restraint Upon Freedom of the Press

This Court on various occasions has noted that the primary function of the First Amendment is to prevent prior restraints upon speech and publication. *See, e.g., Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 249 (1936); *Near* v. *Minnesota,* 283 U.S. 697, 716-717 (1931). Accordingly, any prior restraint of the press

"comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).

This general prohibition upon prior restraints, however, admits of a few narrow exceptions. It has been held that obscenity is not constitutionally-protected speech. *See, e.g., Roth* v. *United States,* 354 U.S. 476 (1957). It has been similarly suggested that "[t]he . . . community may be protected against incitements to acts of violence and the overthrow by force of orderly government [for] [t]he constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that have all the effect of force . . .'" *Near* v. *Minnesota, supra,* at 716. *See also, Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). Finally, it has been suggested in *dictum* that there may exist a limited "military security" exception to the rule against prior restraints. *See Near* v. *Minnesota, supra,* at 716; *Schenck* v. *United States,* 249 U.S. 47 (1919). Yet in *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), wherein this Court specifically addressed the validity of a prior restraint sought to be imposed for purposes of military security, the Court refused in a brief *per curiam* opinion to uphold the prior restraint. Justice White, joined by Justice Stewart, noted in his concurring opinion that even a showing that "revelation of these documents will do substantial damage to public interests" is insufficient to satisfy "the very heavy burden that [the government] must meet to warrant an injunction against publication." *Id.* at 731. In addition, Justice Douglas and Justice Black denied that even a limited "military security" exception can be found under the First Amendment. *Id.* at 714

(Black, J., concurring); *id.* at 720 (Douglas, J., concurring).

Thus, if it may be assumed that obscenity and "fighting words" do not constitute "speech" in terms of First Amendment protections, it is arguable whether there remains a single narrow exception to the accepted rule against previous restraints upon publication. In the instant case, the Oklahoma Supreme Court, having expressly determined that the existing "barriers against the use of prior restraint . . . were not overcome" by Respondents herein, would therefore have this Court acquiesce in the creation of a new exception to the ban on prior restraints—*i.e.,* where a prior restraint is necessary to preserve the anonymity of a youth, who is the subject of a juvenile proceeding, so as not to impair "the possible rehabilitation of the youthful offender and his subsequent integration into society."

Your *amicus,* like the Oklahoma Supreme Court, is unable to find an instance where this alleged "direct confrontation" between the First Amendment rights of the press and the asserted rights of a juvenile to anonymity has been addressed by this Court. Nevertheless, this Court is not without guidance as to the right of the press to freely report on judicial proceedings held in public. The major cases upholding this principle were noted by Justice Brennan, with whom Justice Marshall and Justice Stewart concurred, in *Nebraska Press Association* v. *Stuart,* 97 S.Ct. 2791 (1976) (concurring opinion):

> "Much of the information that the . . . courts enjoined petitioners from publishing *was already in the public domain, having been revealed in open court proceedings or through public documents. Our prior cases have foreclosed any serious con-*

tention that further disclosure of such information can be suppressed before publication or even punished after publication. 'A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.' *Craig* v. *Harney,* 331 U.S. 367, 374 (1947). Similarly, *Estes* v. *Texas,* 381 U.S. 532, 541-542 (1965), a case involving the Sixth Amendment right to a fair trial, observed that 'reporters of all media are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges* v. *California,* 314 U.S. 252 (1941), and *Pennekamp* v. *Florida,* 328 U.S. 331 (1946), which we reaffirm.' *See also* 381 U.S., at 583-585 (Warren, C.J., concurring). And *Sheppard* v. *Maxwell,* 384 U.S. 333, 384-385 (1966), a case that detailed numerous devices that could be employed for ensuring fair trials, explicitly reiterated that '[o]f course, there is nothing that proscribes the press from reporting events that transpire in the courtroom.'" *Id.* at 2820. (emphasis added).

In specific reference to the special exigencies which might justify subsequent punishment for press comment which may interfere with the fair administration of justice, this Court has held that "the substantative evil must be extremely serious and the degree of imminence extremely high," *Bridges, supra,* at 263, and that "the fires which [the expression] kindles must constitute an immediate, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig, supra,* at 376.

In *Cox Broadcasting Corp.* v. *Cohn, supra,* a case involving a suit against a publisher for damages under a State law specifically recognizing the rights of its citizenry to anonymity and privacy, in instances where a member of one's family has been raped, this Court held that a "state may [not] impose sanctions on the accurate publication of the name of a rape victim obtained from public records." *Id.* at 491.

In *Nebraska Press Ass'n* v. *Stuart, supra,* wherein the Supreme Court considered the constitutionality of a judicial order that had been issued to previously restrain a publication which would "tend to prevent a fair trial," Justice Brennan based his concurring opinion in part on the above case law with respect to punishment for speech *after publication:*

> "Prior restraints are particularly anathema to the First Amendment, and any immunity from punishment subsequent to publication of given material applies *a fortiori* to immunity from suppression of that material before publication. Thus, in light of *Craig,* which involved a contempt citation for a threat to the administration of justice, and *Cox,* which similarly involved an attempt to establish civil liability after publication, it should be clear that no injunction against the reporting of such information can be permissible." *Id.* at 2821.

We respectfully submit that the fact that the information sought to be suppressed by the order herein was obtained at a public judicial proceeding makes any effort to enjoin its publication through a "gag order" patently unconstitutional under *Cox* and *Nebraska Press Ass'n.* The Oklahoma Supreme Court has attempted to distinguish *Cox,* and its focus upon the fact that the published information was gleaned from *public* records, on the grounds that

the Oklahoma statute involved in the instant case "provides juvenile proceedings shall be held in private unless *specifically* ordered to be held in public" and that there is "no indication that the Judge distinctly and expressly ordered the hearing to be public." Nevertheless, the fact remains that a detention hearing was held publicly. Newsmen, at said hearing, were able to both obtain the name of the juvenile and to take photographs of him, and once the juvenile's identity is divulged at a public hearing, *Cox* clearly establishes the right to publish that information. Following this hearing—both prior and subsequent to the entry of Respondents' Pretrial Order—news stories have been published identifying the juvenile by name.

Undoubtedly, the trial court, upon hindsight, might wish that the juvenile's hearing had been held *in camera*. Moreover, it is probably erroneous to suppose that, in conducting the detention hearing in public, "the State . . . must have concluded that the public interest is thereby being served." *Cox*, *supra*, at 495. Nevertheless, this Court in *Cox* has made it clear, by analogy, that whatever means exist for protecting the state's interest in private judicial proceedings must be enforced *by the State*, and not by the press:

> "If there are privacy interests to be protected in judicial proceedings, the states must respond by means which avoid public documentation or other exposure of private information." *Id.* at 496.

Faced with similar circumstances in *Nebraska Press Ass'n* v. *Stuart, supra*, this Court held:

> "To the extent that this Order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: 'there is nothing that proscribes the press from reporting events that transpire in the courtroom.' *Sheppard* v. *Maxwell, supra*, at 362-363. *See also, Cox Broadcasting Corp.* v. *Cohn, supra; Craig* v. *Harney, supra. The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint."* *Id.* at 2807, (emphasis added).

That it is incumbent upon *judges,* and not the press, to insure the right to a fair trial (and, by implication, a juvenile's "right to rehabilitation") is preserved without resorting to prior restraint of the press, was also adverted to by Justice Brennan:

> "[A]lthough there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, *judges possess adequate tools short of injunctions against reporting for relieving that tension. To be sure, these alternatives may require greater sensitivity and effort on the part of judges conducting criminal trials than would the stifling of publicity through the simple expedient of issuing a restrictive order on the press; but that sensitivity and effort is required in order to ensure the full enjoyment and proper accommodation of both First and Sixth Amendment rights." Nebraska Press Ass'n* v. *Stuart, supra*, at 2828 (Brennan, J., concurring opinion) (emphasis added).

The fact that publication of the juvenile's name and of other "facts which might lead to the identity of the juvenile" has occurred, both prior and subsequent to the issuance of the Pretrial Order, is fatal to the required finding that the Pretrial Order, bearing, as it does, such a heavy presumption of constitutional in-

validity, actually serves its intended and beneficent purposes. In addressing the showing required to justify the imposition of a prior restraint upon publication which might subvert a criminal defendant's Sixth Amendment rights to a fair trial, Justice Powell has noted:

> "In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is clear threat to the fairness of trial, (ii) such a treat is posed by the actual publicity to be restrained and (iii) no less restrictive alternatives are available. *Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious.*" *Nebraska Press Ass'n* v. *Stuart, supra,* (Powell, J., concurring opinion, reported at 49 L.Ed.2d 704-705) (emphasis added).

Thus, the Order entered below not only offends the prohibitions on prior restraints set forth in the First Amendment and *Near* v. *Minnesota, supra,* it also disregards the clear command of *Cox, supra,* that once information arising from a judicial proceeding legally becomes part of the "public record", the judiciary enjoys no special perquisite which enables it to proscribe the publication of said information. In addition, this Court's decision in *Nebraska Press Ass'n, supra,* places upon judges, not the press, the responsibility for relieving any tension which may exist between robust reporting by the press and the procedural

and substantive rights of parties to judicial proceedings.

In sum, as noted by Justice White's concurring opinion in *Miami Herald Pub. Co.* v. *Tornillo,* 418 U.S. 241 (1974):

> "According to our accepted jurisprudence, the *First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. New York Times Co.* v. *United States,* 403 U.S. 713 (1971). * * * Regardless of how beneficient-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Id.* at 259; (footnote deleted) (emphasis added).

2. Respondents' Pretrial Order Is Constitutionally Invalid Because the Procedures Employed in Its Issuance, and Its Overbroad Scope, Result in the Patent Violation of Petitioner's Fourteenth Amendment Right of Due Process

This Court's opinion, in the only other case it has considered involving the imposition by a trial court of a gag order on the press, clearly confirms, assuming *arguendo* such an order is substantively valid, the further necessity for procedural due process in its imposition. *Nebraska Press Ass'n* v. *Stuart, supra,* at 2826 (Brennan, J., concurring opinion). Yet the Supreme Court of Oklahoma has ruled that Petitioner waived its right to procedural due process by deeming Petitioner's "voluntary appearance," for purposes of challenging the merits of the Order, to be a general appearance under state law. Your *amicus* respect-

fully submits that the Petitioner, having decided, in accordance with its perception of the holding in *U. S.* v. *Dickinson,* 465 F.2d 496, *aff'd after remand,* 476 F.2d 373, *cert. denied,* 414 U.S. 979 (1973), to seek redress for a substantive violation of its First Amendment rights, may not justifiably be held to have voluntarily waived its concomitant right to procedural due process. After application to the Supreme Court of the State of Oklahoma for a Writ of Prohibition barring Respondents from attempting to exercise jurisdiction over Petitioner in this matter and for vacation of the Pretrial Order, the Oklahoma Supreme Court took no action for two months while Petitioner, unlike other media on whom the Pretrial Order was "served", voluntarily complied with the terms of the Pretrial Order. Evidently, Petitioner might have chosen to ignore the restraining order and to frustrate the will of the Court, in view of Respondents' lack of jurisdiction over Petitioner. *See, Nebraska Press Ass'n* v. *Stuart, supra,* at 2806, n. 9. Rather, Petitioner submitted to the jurisdiction of the Court—in either conscientious or inadvertent disregard of the strategic means available to it for avoiding compliance—in order that Respondents' order might be fully reviewed in light of both the procedural and substantive dictates of the Constitution. The result, as feared by Justice Brennan, *Nebraska Press Ass'n, supra* at 2826 (concurring opinion), is the unequal treatment of different organs of the press media.

Moreover, questions of *in personam* jurisdiction aside, it is respectfully submitted that the procedures employed by Respondents in the imposition of this order "cannot withstand the mildest breeze emanating from the Constitution." *Southeastern Promotions,*

Ltd. v. *City of West Palm Beach,* 457 F.2d 1016, 1017 (1972). This Court, in various of its decisions, has formulated procedures which must be followed before material potentially protected by the First Amendment may be suppressed. The speech involved herein, unlike obscenity, is clearly within the protection of the First Amendment. The procedural requirements governing suppression of obscene material is therefore relevant, for "if the Constitution requires elaborate procedural safeguards in the obscenity area, *a fortiori* it should require equivalent procedural protection when the speech involved . . . implicates more central First Amendment concerns." Monaghan, *First Amendment "Due Process",* 83 Harv. L. Rev. 518, 519 (1970).

Your *amicus* will not burden this Court with a recitation of the unusual procedures employed by Respondents in the issuance and service of the Pretrial Order. Rather, we with to recall to the Court's attention the vital necessity that certain procedures, designed to assure that the imposition of a prior restraint upon First Amendment freedoms is not unfounded or excessive, be diligently observed.

In *Freedman* v. *Maryland,* 380 U.S. 51 (1965), the Supreme Court held that before an allegedly obscene motion picture may be suppressed, "a judicial determination in an adversary proceeding" is necessary. *Id.* at 58; *see also, Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

In *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175 (1968), a case not involving obscene material, this Court invalidated an injunction against the staging of a political rally because it was

issued *ex parte* and no meaningful effort had been made prior to the issuance of the order to inform, or to invite the participation of, those enjoined by its terms. Justice Brennan, discussing in *Nebraska Press Ass'n* the procedures which would be required to be followed in the issuance of an otherwise valid gag order, stated:

> "[T]o bind the media, they would have to be notified and accorded an opportunity to be heard. *See, e.g., Carroll* v. *Princess Anne,* 393 U.S. 175 (1968); *McKinney* v. *Alabama,* — U.S. — (1976)." *Nebraska Press Ass'n, supra,* at 2826.

Further, we respectfully submit that any decision to restrain the press must be consistent with the record as developed at the hearing, *see Tinker* v. *Des Moines School Dist.,* 393 U.S. 503, 509 (1969), and based on particularized findings. *Id.; cf. Nebraska Press Ass'n* v. *Stuart, supra,* at 2804-2805; *United States* v. *Schiavo,* 504 F.2d 1, 13-15 (concurring opinion), *cert. denied,* 95 S.Ct. 690 (1974).

Finally, to the extent that Respondent Halley has construed the Pretrial Order to impliedly incorporate into the terms of its prohibition any other "facts which might lead to the identity of the juvenile," said Order is patently overbroad and unconstitutionaly vague. *See, e.g., Hynes* v. *Mayor and Council of the Borough of Oradell,* 48 L.Ed.2d 243 (1976); *Smith* v. *Goguen,* 415 U.S. 566 (1974); *Shelton* v. *Tucker,* 364 U.S. 479 (1960). For "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963). The validity of a prohibition upon the publication of unspecified "implicative information"

has been addressed specifically by this Court in *Nebraska Press Association* v. *Stuart, supra:*

> "As part of the final order, entered after plenary review, this prohibition regarding 'implicative' information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights." *Id.* at 2807.

Thus, the Pretrial Order issued below not only offends the substantive command of the First Amendment, but has been upheld despite its issuance without due regard for the substantive and procedural due process rights of Petitioner. As a result, the restraint was issued without participation or comment by Petitioner and is invalidly "predicated [merely] upon surmise or conjecture that untoward consequences may result." *New York Times* v. *U.S., supra,* at 725-26 (Brennan, J., concurring opinion).

CONCLUSION

In light of the foregoing, and in support of the arguments advanced by the petitioner in its brief in chief, your *amicus* respectfully urges that this Court vacate the order below. In so doing, we urge that this case presents to the Court an opportunity to lay this problem to rest for the foreseeable future by issuing an opinion which will establish once and for all, absent Constitutional change, the perimeters within which Courts may issue prior restraints upon the press, if there be any such.

It seems to your *amicus* that the time has come when fencing between the courts and the press should be laid to rest so that more productive ends can be served. The flow of litigation in this area over the past ten years indicates a need for a general rule as Justice

White contemplated in his concurring opinion in *Nebraska Press Ass'n* v. *Stuart, supra,* at 2808.

> "Technically there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable. It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no farther than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues. If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail."

Absent such a general rule, we shall have a constant stream of minor fact variations which will needlessly take up the time of this Court and of the press in preventing encroachments upon the First and Fourteenth Amendments by trial judges who do not yet believe or perhaps understand the teachings of this Court in the cases cited by your petitioner and your *amicus* herein.

We urge and plead that consideration be given to this approach.

Respectfully submitted,

ARTHUR B. HANSON
MITCHELL W. DALE
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
202/298-6161